STATE OF ILLINOIS)
) SS.
COUNTY OF WILLIAMSON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse accident	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ANNIE WADE,

Petitioner,

vs. NO: 10 WC 30912

GENERAL DYNAMICS, 14IWCC0121

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court of Williamson County. The Commission had affirmed the Decision of the Arbitrator denying compensation. However, the Commission found the Arbitrator's determination that Petitioner was not credible was not supported by the record. The Commission noted that the case had been heard by another Arbitrator and the decision was issued by an Arbitrator who had not heard the case after the Arbitrator that heard the case was not reappointed as arbitrator. The Commission then wrote a full decision explaining that Petitioner's accident, caused by tripping over a shoelace, was not within the scope of her employment.

The Circuit Court of Williamson County reversed the Commission on the issue of accident and found that Petitioner proved that the requirement that she work at an accelerated pace put her at greater risk than the general public to trip over her shoelace. The Circuit Court of Williamson County remanded the case to the Commission to determine all other issues. Therefore, the issues now before the Commission are causation, temporary total disability, permanent partial disability, and medical expenses.

Findings of Fact and Conclusions of Law

1. Petitioner testified on June 10, 2010 she worked for Respondent as an "NAIC" and performing the task of "reverse torque." In that role you "pick up two parts. You examine them for gaps. You take them in. You put them in. You come back out. You work the levers. You pick up two more parts inspect them as you go in. You go in, I pick one out, drop one in, pick one out, drop one in. You inspect for gaps again. You

come around, put them in, do your thing." The parts to which she was referring are projectiles or bullets. Her job was ensuring that the top of the projectile is properly screwed into the body. If they're good she puts them in the good box, if there is a gap she puts them in the reject box.

2. She indicated she inspected two projectiles at a time; one in each hand. Respondent would like them to process 400 projectiles an hour. After every 500, "parts had to be mastered" "to make sure it was still working." She observed the video submitted as Respondent's exhibit 4. It was accurate but did not show the speed of the job. "You can't work at that speed and do what you've got to get done."

3. Petitioner also testified that during the process of doing that job, she "turned to leave the bay looking for [her] parts" and stepped on her shoestring. When she pivoted it jerked her and threw her off balance. She "twisted back to grab the table to keep from falling and hitting the floor." She felt pain in her lower back and "butt cheek." The incident occurred at about 1:30. She completed her shift which ended at 3:00. Petitioner sought treatment on June 15, 2010. She waited to seek treatment because she thought she simply pulled a muscle. But her symptoms got worse. Pain started moving down into her knee; "from [her] butt, into [her] knee, burning real bad." Monday it hurt so much she could not sleep; she went to Logan Primary Care on Tuesday and was prescribed Flexeril.

4. Petitioner further testified she did not immediately report her accident to Respondent because she "hadn't been back two months from [her] hand surgery" and "didn't want to get in trouble." However, her condition progressively got worse; the more she sat it got worse. She couldn't stand, she couldn't sit, so she had to "turn it in." She was directed by Respondent to see Dr. Austin, whom she saw on July 19, 2010. She reported the accident date as June 17, 2010. She really could not remember the date but knew it was a Thursday because she "remembers pay day." Dr. Austin prescribed medication and put her on light duty.

5. On August 9, 2010, Respondent concluded the claim was not meritorious and would not let her work light duty. Petitioner's condition continued to get worse. Physical therapy and injections were recommended but she did not have the injections. Physical therapy was discontinued because it was not doing her any good. Finally, surgery was performed on February 7, 2011. The surgery was successful and her radiating pain is mostly gone. Dr. Jones indicated that residual pain would persist for about six months before the nerve irritation subsided. She has occasional flare-ups but her back is good. She is able to perform her job without restrictions.

6. On cross Petitioner testified she had a previous workers' compensation claim and was knowledgeable about the process (on February 28, 2011, she settled 09WC44943 for $12,000 representing 13% loss of the left hand). She acknowledged she claimed the accident occurred on June 10, 2010, but did not report it to Respondent until July 16, 2010; she also conceded that she initially reported the accident was on June 17, 2010.

7. She reported that stepping on her shoelace actually precipitated the accident. She

continued working until August 9, 2010, when Respondent refused to accommodate her light duty. From the date of the accident to the time she was put on light duty, Petitioner was working "20 Manyard." In that position, the workers are rotated. They catch projectiles with their hands coming out of a chute, put them in a can and send them down, "put the lid on them, scoot them down, weigh them, skid them," and load the cases. In the job the only thing she lifted were cans onto the skids. The cans weigh "168 pounds. And then up front you turn, lift a box of projectiles, you load it onto the table, flip it up, then you walk over, you get a box of cases, and you load them on the table."

8. Petitioner also testified that she did report to the physician's assistant at Logan Primary Care that her condition was work-related but that she had not reported it yet. She had the bills paid by her group insurance. She received some short-term disability benefits from Respondent, which she applied for immediately after she was "out of work on August 9, 2010." She has worked for Respondent 10 years. She has always worn the same type of boots. It was just "understood" that she was to produce 800 projectiles in two hours.

9. Her previous workers' compensation claim was for carpal tunnel syndrome and Respondent had not yet decided whether to accept that claim at the time of the instant accident. She was not reprimanded for filing the first claim, but while on light duty she was forced "to go outside in the smoke shack, pick up cigarette butts in front of [her] co-workers. That was humiliating." She did not want to be put back on that crew.

10. On redirect examination, Petitioner testified "reverse torque" was not her regular job and she worked it only one day. When she backtracked to try to remember the date of the accident, she missed it by a week. She tripped over her shoelace while inspecting parts and moving quickly to get the task done.

11. Cecil Glover testified on June 10, 2010, he was working reverse torque in the bay next to that in which Petitioner was working. He noticed Petitioner limping and asked her whether she hurt her knee. She replied that it was not her knee but she thought she "pulled her butt muscle." He did not see her trip. He viewed the video. The rate of speed it showed was "about a third" of the speed of actual work. If you performed at that speed "you would have been pulled out because you wouldn't have gotten enough done."

12. On cross examination, the witness answered that Respondent would have liked employees to process at least 2,000 projectiles in a work day.

13. The medical records indicate that on June 15, 2010, Petitioner presented to Dr. Workman at Logan Primary Care with lower back and right hip pain for four days after twisting her leg. Dr. Workman noted tenderness on palpitation, muscle tightness, and decreased range of motion was noted but with no neurological deficits. He diagnosed Muscle spasm and prescribed Flexeril.

14. On July 19, 2010, Petitioner presented to Dr. Austin complaining of pain in her lower back radiating into her "butt cheek down right leg into knee where it feels on fire." She reported on June 17, 2010 twisting while stepping on her shoelace at work. Dr. Austin

diagnosed strain/sprain/pain in the right lumbosacral spine with some spasms, in the right hip joint, and in the right knee. He ordered x-rays, recommended exercises, and put her on light duty. On July 26, 2010, Petitioner returned to Dr. Austin and reported no improvement. Dr. Austin continued her work restrictions.

15. On August 11, 2010, Petitioner returned to Logan Primary Care reporting of low back pain after twisting her back at work in June. She also had pain in her right knee and her foot and ankle turned cold. She indicated she got the accident date wrong and it was deemed not compensable under workers' compensation. Currently, she was taking Flexeril and Norco.

16. On August 17, 2010, Petitioner returned to Logan Primary Care. Her prescriptions were refilled, an MRI was ordered, and she was "instructed off work."

17. An MRI showed central and left-sided disc bulge/herniation at L4-5 with narrowing of the left neural foramen, a mild posterior disc bulge at L5-S1 with some narrowing of the left neural foramen, and a disc bulge at T11-12 which was not well visualized in the lumbar scan. The radiologist indicated the MRI reported the findings were of unknown significance because her symptoms were right sided.

18. On August 25, 2010, Dr. Workman continued Petitioner's off work status and referred her to Dr. Kennedy, an orthopedic surgeon, for a herniated disc. On October 25, 2010, Petitioner reported her symptoms persisted and she was scared to walk because of fear of falling. Dr. Workman referred her to a neurological spine specialist, Dr. Jones.

19. On September 21, 2010, Petitioner presented to Dr. Kennedy complaining of low back pain since a work accident. She reported twisting her back and had radiating pain down her right leg. She was on light duty for about two months but her condition worsened. She was unable to work since August 9th. Dr. Kennedy noted that the MRI showed a disc prolapsed at L4-5 with some mild foraminal encroachment and some mild degenerative changes at L5-S1. He did not see too much in the MRI that was worrisome with respect to nerve root compression. He thought she would benefit from physical therapy and trigger point injections but she is not then a surgical candidate.

20. On December 14, 2010, at Respondent's request Petitioner presented to Dr. Lange for an examination pursuant to Section 12 of the Workers' Compensation Act. Petitioner related twisting her back while at work when she turned and stepped on her shoelace. She felt pain in the right hip and knee. However, toward the end of August or early September she developed symptoms in the left lateral thigh area. She did not report it to Respondent until July 16, 2010, because she thought her condition would resolve. Her attorney sent her to Dr. Kennedy who recommended injections, which apparently were not administered. She was unable to get another appointment with Dr. Kennedy and was referred to Dr. Jones. She was currently not working because Respondent would not accommodate light duty.

21. Dr. Lange noted "Waddell testing was moderately positive," and objective neurological

functions were normal. He looked at the MRI film and noted degenerative disc changes at T11-12 and degenerative desiccation at L4-5 and L5-S1, which were consistent with her age (45), gender, and nicotine exposure (the record indicates that Petitioner reported smoking up to two packs of cigarettes daily for about 20 years). "She does have disc prominences interestingly on the left not only L4-5, but also L5-S1 with small high intensity zones at each adjacent to the applicable lower vertebral body."

22. Dr. Lange did not relate Petitioner's current condition to her work incident because her initial symptoms were on the right side which apparently had resolved. The MRI showed no significant pathology on the right. Because symptoms on the left did not arise until about three months after the incident "it would seem impossible to correlate her left sided symptoms, therefore, with her activities in June."

23. On December 28, 2010, Petitioner presented to Dr. Jones' physician's assistant ("PA") upon referral from Dr. Workman. She reported severe pain which began six months ago after tripping and twisting her back at work. Heat, ice, and physical therapy did not relieve pain. Dr. Jones' PA related that the MRI showed degenerative disc disease at L4-5 and L5-S1 with moderate left foraminal narrowing at L4-5 and bilateral foraminal narrowing at L5-S1. Dr. Jones' PA diagnosed degenerative disc disease of the lumbar spine, lumbar disc displacement, lumbar radiculitis, and lumbar spondylosis, ordered an EMG, and referred Petitioner for epidural steroid injections.

24. On February 2, 2011 Petitioner reported that the pain was now mostly going down the left leg rather than the right. Dr. Jones noted that Petitioner had a herniated disc at L4-5 which was most likely compressing the transversing L5 nerve root. He noted that Petitioner failed conservative treatment and because the condition lasted more than six months it was unlikely to resolve itself. He informed her that he did not believe the surgery would relieve all of her leg pain but it would help. They would schedule surgery.

25. On February 7, 2011, Dr. Jones performed L4-5, L5-S1 hemilaminotomy/laminectomy with foraminotomy for L4-5, L5-S1 lateral recess and foraminal stenosis with radiculopathy.

26. On February 22, 2011, Petitioner presented for follow up after surgery. The pain had markedly improved and she did not need pain medication. She was able to increase activity without incident.

27. On March 16, 2011, Petitioner reported doing well. She had intermittent pain, but Dr. Jones indicated that the "severity of the problem" was "mild." He released her to work, but is unclear from his note whether it was with restrictions.

28. On March 26, 2011, Petitioner was doing very well. Her leg pain had revolved but she did have some intermittent but tolerable paresthesis in her legs. Petitioner wanted to return to work; Dr. Jones thought that was reasonable and released her without restrictions. He warned her that her back had significant degeneration and she should be

cautious lifting heavy objects, and released her from care.

29. Dr. Jones testified by deposition on July 20, 2011. He reviewed Petitioner's MRI which showed disc herniations at L4-5 and L5-S1 with and a "newer annular tear at L5-S1." He indicated it was recent because the signal at T2 was still hot. "She had done it in the last three months."

30. Dr. Jones explained the change in the radiating pain from the right leg to the left leg to the fact that the herniations were "pretty central." "If you initially have like a large left central disc herniation at its irritating the left leg, well it can retract enough that the left leg gets better but there is still enough of a central portion that it's bulging out and starts hitting the right nerve root which is now getting irritated because your facet is more arthritic on that side." He "sees this all the time." Her history correlated to the objective findings in the MRI. The surgery he performed was minimally intrusive. He released her to work on March 16, 2011. She had a good recovery and was able to return to work in five weeks.

31. When asked whether the reported accident was a cause of the condition, Dr. Jones responded: "probably was." "Most of these people herniated a disc bending and twisting and it's actually the twisting motion is worse than the actual bending and it's usually we are doing something silly. It doesn't even have to be a lot of weight."

32. On cross examination, Dr. Jones acknowledged that the in the initial visit, his PA did not note a date of accident, and there was little in the way of detailed description of the mechanism of injury. He did not review any other medical records. He did not note any weakness or sensory disturbances, which would indicate neurologic abnormalities. He did not remember Petitioner saying anything about carrying anything at the time of the accident.

33. Dr. Jones did not have any imaging reports prior to the date of the accident. He agreed that the MRI report did not mention an annular tear at L5-S1, but "it's pretty evident." He has not heard from Petitioner after he released her from care. He did not believe she suffered functional loss due to the surgery.

34. On redirect examination, Dr. Jones testified that Petitioner consistently related the onset of pain to the twisting injury. The history of the accident would be consistent with the pathology. Petitioner appeared to be a "straight shooter" to the witness.

35. Dr. Lange testified by deposition on August 30, 2011. He examined Petitioner on December 14, 2010 at the request of Respondent. She reported that in the process of working she started to turn and was standing on a loose shoestring. She suggested that she twisted her torso and began to fall but broke the fall with her left arm on adjacent machinery. She developed pain in her right hip and knee. In August or September her symptoms changed and developed pain in her left thigh. At the time of his examination her left leg symptoms were the most bothersome. His neurologic examination was objectively normal. The MRI showed some abnormalities including a degenerative disc

at T11-12, prominences at both L4-5 and L5-S1, abnormal desiccation at those levels, and a little abnormality in the annulus.

36. Dr. Lange noted that the initial medical records did not indicate any relation of the injury to Petitioner's work activities. He thought she did have radicular symptoms on the left, but they were not really radicular on the right because the pain did not extend below the knee. Her symptoms were not in any nerve root distribution that would correlate with the MRI findings or clinical examination. He opined that Petitioner had reached maximum medical improvement with regard to the right leg symptoms and the left leg symptoms would not have been related to the alleged accident. For her left leg he would have recommended conservative treatment.

37. On cross examination, the witness testified a twisting injury as described by Petitioner could cause or aggravate herniations at L4-5 and L5-S1, and/or an annular tear at L5-S1. "Everybody has annular tears given enough time on MRI," but they can be traumatic. He did not believe Dr. Jones had any scientific basis to opine that the annular tear was less than three months old. He agreed that the MRI showed a herniation at L4-5 and disc bulge with some narrowing at L5-S1. A person with a central herniation can have radicular symptoms on either or both sides. However, her primary pathology was at L4-5 which "was purely right sided." He was not provided the records of Dr. Jones, his operative report, or his deposition. He had no problem with Petitioner's report of right leg pain associated with her history of accident.

As noted above the Circuit Court of Williamson County reversed the Commission's affirmation of the Decision of the Arbitrator and found that Petitioner did sustain her burden of proving accident. The Circuit Court then remanded the case back to the Commission to determine all other issues including causation, temporary total disability, permanent partial disability, and medical expenses.

In determining the issue of causation, the Commission finds the opinion of Dr. Jones more persuasive that that of Dr. Lange. Dr. Lange stressed that the pathology was on the right but her current symptoms were on the left. The MRI report indicates there was pathology in the left spine. In addition, Dr. Jones explained the change in the radiating pain from the right leg to the left leg to the fact that the herniations were "pretty central." "If you initially have like a large left central disc herniation at its irritating the left leg, well it can retract enough that the left leg gets better but there is still enough of a central portion that it's bulging out and starts hitting the right nerve root which is now getting irritated because your facet is more arthritic on that side." Dr. Jones testified he "sees this all the time." Dr. Jones also noted that Petitioner's symptoms and history of mechanism of injury correlated to the objective findings in the MRI.

The Commission finds that the medical expenses incurred by Petitioner were all necessary and reasonable to alleviate her condition of ill-being caused by her work accident. Therefore, the Commission awards all medical expenses submitted by Petitioner subject to the applicable medical fee schedule.

The Commission concludes that Petitioner was not able to work between August 8, 2010,

14IWCC0121

the date Respondent refused to accommodate her light duty restrictions and March 16, 2011, the date Dr. Jones released her to work. Therefore, the Commission awards Petitioner 31 2/7 weeks of benefits for the period of her temporary total disability.

Petitioner seeks an award of 25% loss of the person as a whole. The Commission notes that Dr. Jones testified that his surgical procedure was minimally intrusive, Petitioner had an excellent recovery, she was able to return to work within five weeks of the surgery, and Dr. Jones did not believe she suffered any functional loss after the surgery. Considering the entire record before us, the Commission awards Petitioner 75 weeks permanent partial disability benefits, representing loss of 15% of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $434.47 per week for a period of 31 2/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $391.02 per week for a period of 75 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of the use of 15% of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the medical expenses submitted into evidence by Petitioner under §8(a) of the Act, subject to the applicable medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $60,000.00. The party commencing the proceeding for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

DATED: FEB 19 2014

Ruth W. White

Ruth W. White

Michael P. Latz

Michael P. Latz

Charles J. DeVriendt

Charles J. DeVriendt

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

WADE, ANNIE
Employee/Petitioner

Case# **10WC030912**

GENERAL DYNAMICS
Employer/Respondent

14IWCC0121

On 12/14/2011, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.04% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1580 BECKER SCHROADER & CHAPMAN
MATT CHAPMAN
PO BOX 488
GRANITE CITY, IL 62040

0299 KEEFE & DEPAULI PC
JAMES K KEEFE SR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)

COUNTY OF WILLIAMSON)

14IWCC0121

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

ANNIE WADE
Employee/Petitioner

Case: 10WC 30912

v.

Consolidated cases: N/A

GENERAL DYNAMICS
Employer/Respondent

An Application for Adjustment of Claim was filed in this matter, and a Notice of Hearing was mailed to each party. The matter was heard by the Honorable Andrew Nalefski, arbitrator of the Commission, in the city of Herrin, on October 13, 2011. As Arbitrator Nalefski is no longer an arbitrator of the Commission, the matter was administratively assigned to the Honorable Peter Akemann, arbitrator of the Commission, who renders the decision which follows.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS ON THE ARBITRATOR

14IWCC0121

On 06/10/2010, Respondent was operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship existed between Petitioner and Respondent.

The arbitrator finds that the petitioner failed to prove that she sustained an accident that arose out of and in the course of employment on June 10, 2010.

The issue of notice is moot.

The issue of causal connection is moot.

In the year preceding the injury, Petitioner earned $33,876.44; the average weekly wage was $ 651.70.

On the date of accident, Petitioner was 45 years of age, married with no dependent children.

The issue of medical services is moot.

Respondent shall be given a credit of $ N/A for TTD, $ N/A for TPD, $ N/A for maintenance, and $ N/A for other benefits, for a total credit of $ N/A.

Respondent is entitled to a credit of $ 1,665.00 for non occupational benefits paid.

Orders of the arbitrator

Compensation is denied

All other issues are moot.

Rules Regarding Appeals: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

Statement of Interest rate: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Peter Akemann

December 8, 2011

DEC 14 2011

In support of the Arbitrator's finding under (C) ACCIDENT; the Arbitrator finds the following facts:

On June 10, 2010, Petitioner was employed as an MCA Operator with Respondent. On that date she was working in the job classification of Reverse Torque. Respondent's Exhibit #4 is a DVD which depicts the work activities and the work area involved. Petitioner testified that her job was to inspect projectiles and put them in a machine to tighten the projectiles. Petitioner would then inspect the projectiles before repeating the task. The task is performed in two rooms, or bays, separated by a wall. One room contains the projectiles on a pallet and the other room contains the reverse torque machine. The projectiles weigh only ounces.

Petitioner testified that while there were no specific quotas, it was generally expected that employees run approximately 800 projectiles through the reverse torque every two hours. She testified on June 10, 2010, after taking two projectiles out of the reverse torque machine and inspecting them for gaps, she tripped over her shoelace and twisted her lower back. Cecil Clover, a co-worker, testified that Petitioner complained on that date that she pulled her "butt muscle." Testimony by both Petitioner and Mr. Clover reflects that Respondent's Exhibit #4 does accurately reflect the job activities and the size of the area where the job is performed; however, when performing the job duties, they work at a faster pace.

Petitioner did not report the alleged injury to Respondent until July 16, 2010, or approximately 40 days later. (Res. Ex. 2) The First Aid/Injury Report completed by Petitioner on July 16, 2010, specifically states: "Doing reverse torque. Went to pivot back around and stepped on shoestring. Top half moved, lower did not." Petitioner reported pain in her right hip and right thigh. She reported that the cause of the injury was an untied shoe. (Id)

The medical records offered reflect Petitioner was seen at Logan Primary Care, her primary care physician, June 15, 2010. (Pet. Ex. 2) The records reflect she reportedly injured herself four days earlier. She complained of right hip pain for four days. She reported she may have twisted her leg four days ago. There was no mention that the injury occurred at work. Petitioner testified she did submit medical expenses through her group health insurance. She continued to work without lost time or any further medical care and treatment until July 16, 2010, when she first reported the alleged injury.

Petitioner was seen by the plant nurse on July 16, 2010. She reported the injury occurred on June 17, 2010 and not June 10, 2010. She reportedly went to Logan Primary Care on June 22, 2010; however, the records from Logan Primary Care reflect the visit was on June 15, 2010.

Petitioner was next seen by Dr. Mark Austin and reported the mechanism of injury was that she stepped on an untied shoelace. (Pet. Ex. 1) She followed up with Dr. Austin and was subsequently referred to Dr. David Kennedy. Following the visit with Dr. Kennedy, she came under the care of Dr. Jones who performed surgery February 7, 2011 consisting of an L4-5, L5-S1 hemilaminotomy/laminectomy with foraminotomy. Dr. Jones released her to return to work without restriction on March 16, 2011 and Petitioner returned to work without restriction at that time. (Pet. Ex. 3)

ANALYSIS

The Arbitrator notes that the Petitioner did not report her alleged accident for 40 days. While this does not defeat her claim based on Notice, the Arbitrator finds such a detail strains the Petitioner's credibility based on her testimony and the early medical records. When asked why she took so long to report the injury, she testified that she was " hoping that it was just a pulled muscle, and I had just got back—I hadn't been back two months from my hand surgery, and I didn't want to get in trouble." (Transcript, page 21) The Arbitrator notes that there is nothing in the medical records that would support Petitioner's testimony in that regard and clearly Petitioner was aware of what is required to pursue benefits under the Workers' Compensation Act as a result of a work injury.

The Arbitrator concludes that the first medical visit after the alleged date of injury makes no mention of any work related event. The record indicates that the Petitioner presented for "right hip paid for 4 days." (Pet. Ex. 2, page 2) Nothing is said about a work related injury. Bills were submitted through the respondent's group carrier.

The Arbitrator concludes that for someone who had so recently had a accepted claim from the same employer, the reporting of a different accident date (June 17, 2010) and the length of time the Petitioner had taken to report said claim (40 days) strains the Petitioner's credibility.

The Arbitrator further notes that the surgery performed by Dr. Jones was a result of degenerative disc disease with no clear evidence of a traumatic injury. Dr. Lange testified the surgery performed was reasonable and necessary, but could not correlate Petitioner's complaints to the injury. Dr. Lange pointed out that Petitioner's complaints in the early medical records as of July 16, 2010 revealed right lower extremity complaints, but when treatment was provided by Dr. Jones, the complaints involved the left lower extremity and therefore there would fail to exist causal relationship between anything that may have occurred on June 10, 2010 and the left lower extremity complaints which were not reported to any physician until the end of August or early September, 2010.

Finally, the Petitioner's testimony and her hand written description of the events, support that she tripped over her untied shoe lace. . The Arbitrator further notes that there was no evidence offered to suggest that Petitioner's work requirements prevented her from the inability to take the time to tie her shoe.

The Arbitrator concludes as a matter of law that our Supreme Court has held that Illinois is not a positional risk state. There must be a showing of an increased risk to which the employee is subjected as compared to the general public. In this case, the alleged injury was, by the Petitioner's own testimony, a result of a risk personal to the employee rather than incidental to her employment. Clearly, keeping one's shoes tied is personal and is one that the entire population shares and is not connected to Petitioner's employment.

The arbitrator finds that the petitioner failed to prove that she sustained an accident that arose out of and in the course of employment on June 10, 2010.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nancy Hernandez,
Petitioner,

vs.
White Chocolate Grill,
Respondent,

NO: 10 WC 46243

14IWCC0122

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, permanent partial disability, causal connection and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 15, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 19 2014

MB/mam
O:2/6/14
43

Mario Basurto

David L. Gore

Stephen Mathis

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HERNANDEZ, NANCY
Employee/Petitioner

Case# **10WC046243**

14IWCC0122

WHITE CHOCOLATE GRILL
Employer/Respondent

On 4/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0140 CORTI ALEKSY & CASTANEDA PC
JOHN J CASTANEDA
180 N LASALLLE ST SUITE 2910
CHICAGO, IL 60601

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
JEFFREY T RUSIN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

14IWCC0122

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Nancy Hernandez,
Employee/Petitioner

v.

White Chocolate Grill,
Employer/Respondent

Case # **10** WC **46243**

Consolidated cases: **none**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Wheaton**, on **2/15/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0122

FINDINGS

On **10/16/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$34,836.36**; the average weekly wage was **$669.93**.

On the date of accident, Petitioner was **23** years of age, ***single*** with **1** dependent child.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$959.54** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$3,654.98** for other benefits (disputed medical after 1/23/12), for a total credit of **$4,614.52**. (Arb.Ex.#1).

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act. (Arb.Ex.#1).

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $446.62 per week for 4-5/7 weeks, commencing 10/20/10 through 11/21/10, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 10/17/10 through 2/15/13, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $959.54 for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $53,040.83 to Accredited Ambulatory Care, $3,121.73 to Chicago Pain & Orthopedic Institute, $265.29 to Injured Workers Pharmacy, $3,438.82 to Dr. Mark A. Lorenz, and $4,842.59 to Pinnacle Pain Management, as provided in Sections 8(a) and 8.2 of the Act. (Arb.Ex.#2).

Respondent shall be given a credit of $3,654.98 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $401.96 per week for 75 weeks, because the injuries sustained caused the 15% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

4/12/13
Date

APR 15 2013

STATEMENT OF FACTS: 14IWCC0122

Petitioner testified through a Spanish interpreter. The parties stipulated that Petitioner suffered an accidental injury on October 16, 2010. (Arb.Ex.#1). Petitioner testified that she worked in the pantry area for Respondent making salads which required her to remove boxes of lettuce from the cooler and carry containers of other produce from the storeroom to her work station.

Petitioner testified that on the date of injury, October 16, 2010, she was carrying a container of avocados from the storage room when she slipped on oil and fell to the ground. She finished her work day but noticed pain in her hip and back area near the middle of the back. Petitioner's shift normally started at 4:00 p.m. and she worked until closing - usually 11:00 p.m. She indicated that she fell between approximately 9:40 pm and 10:00 p.m. Petitioner noted that the injury occurred on Saturday and that the next day, Sunday was her normal scheduled day off work. She indicated that she did not engage in any activities over the weekend.

Petitioner testified that when she returned to work on Monday October 18, 2010 she advised her manager Jessica that the bottom part of her back was hurting. She noted that Jessica had seen her fall on the date of the accident.

Petitioner subsequently visited chiropractor Dr. John Roza on October 19, 2010. Petitioner indicated that a friend had recommended Dr. Roza. (PX1). Dr. Roza recorded a history of slipping and falling, that the patient complained of severe pain and that bending aggravated the pain. (PX1). Dr. Roza also noted that Petitioner denied any previous injury or back complaints. (PX1). Dr. Roza ordered x-rays that were reported as normal, started chiropractic therapy for two visits and eventually prescribed an MRI. (PXX1). Petitioner noted that instructed her to remain off work at the time of her visit on October 20, 2010.

At the suggestion of her cousin, Petitioner went on her own to see Dr. Mark Lorenz on October 28, 2010. (PX2). Dr. Lorenz. At the time of this initial visit Dr. Lorenz recorded the aforementioned history of the accident, that she had seen Dr. Roza for two visits and that she had been taken off work as of October 20, 2010. (PX2). Dr. Lorenz diagnosed an acute back strain, prescribed physical therapy and advised Petitioner to remain off work. (PX2).

Petitioner thereupon attended physical therapy at ATI from November 3, 2010 through January 28, 2011. (PX3). Petitioner stated that physical therapy treatments had helped a "little bit."

On March 14, 2011, Petitioner returned to Dr. Lorenz who prescribed an MRI and maintained a light duty restriction of no lifting over 20 lbs., which Dr. Lorenz had imposed as of November 18, 2010. (PX2). On March 24, 2011, Petitioner underwent an MRI at Hinsdale Ortho Imaging which was interpreted as evidencing a L5-S1 broad-based central disk protrusion without significant central spinal stenosis or encroachment of descending S1 nerve roots. (PX2).

On April 11, 2011, Petitioner returned to Dr. Lorenz who reviewed the MRI and diagnosed L5-S1 spondylosis with a central disc herniation. (PX2). Dr. Lorenz discussed surgical and non-surgical options, including an FCE. (PX2). After discussing the options with Petitioner, Dr. Lorenz ordered a discogram and maintained the 20 lb. lifting restriction. (PX2). On May 24, 2011, Petitioner underwent a discogram at Accredited Ambulatory Care which revealed discogenic pain at the L5-S1 level. (PX4).

On June 6, 2011, Petitioner visited Dr. Avi Bernstein at the request of the Respondent for purposes of a §12 examination. (RX1). Dr. Bernstein reviewed medical records but did not have the MRI report or the discogram

report at the time of the examination. (RX1, p.2). Dr. Bernstein opined that Petitioner's options were to live with the diagnosed condition or consider a fusion surgery. (RX1, p.2). Dr. Bernstein also noted although he felt from a non-surgical standpoint Petitioner was at MMI, he indicated that it would not be unreasonable to obtain an FCE. (RX1,p.2).

Petitioner visited Dr. Lorenz the same date of her §12 examination with Dr. Bernstein, on June 6, 2011. Dr. Lorenz reviewed the discogram and diagnosed L5-S1 disc herniation with annular tears and axial back pain. (PX2). As a result, Dr. Lorenz recommended a L5-S1 fusion and maintained Petitioner's light duty restrictions. (PX2).

Petitioner worked light duty from November 2010 through the present. She indicated light duty meant she did not have to do any lifting at work, like lifting garbage, boxes of lettuce or the crepe machine.

On August 16, 2011, Dr. Lorenz noted that Petitioner had failed conservative care and recommended a surgical fusion. (PX2). Petitioner testified that she decided that she did not want to undergo surgery because of her baby and the fact that she was scared that something might happen to her.

In an addendum report dated September 26, 2011, Dr. Bernstein opined that at the time of his last examination on June 6, 2011 Petitioner "… was functioning reasonably well and did not demonstrate pain behavior to the extent that I would consider surgery to be reasonable or appropriate." (RX2).

On November 28, 2011, Dr. Lorenz referred Petitioner for pain management, maintained her work restrictions of 20 lbs. and requested that she return after an FCE. (PX2).

Petitioner subsequently underwent an FCE on December 14, 2011. (PX3). The FCE indicated that Petitioner was capable of working at the light level. (PX3).

On January 23, 2012, Dr. Bernstein authored another addendum report wherein he opined that Petitioner "is capable of returning to her prior work without restriction. She is at maximum medical improvement. No further treatment is indicated or necessary. She is not a surgical candidate." (RX3).

On June 14, 2012, Petitioner returned to Dr. Lorenz at which time the latter imposed restrictions of occasionally lifting 32 lbs. and discharged Ms. Hernandez with a recommendation to follow up with pain management. (PX2).

On July 3, 2012, Petitioner visited Dr. Morgan at Chicago Pain and Orthopedic Institute per the referral of Dr. Lorenz. (PX5). Dr. Morgan examined Petitioner, reviewed the MRI and x-rays, and recommend bilateral facet joint injections. (PX5). Dr. Morgan also continued the work restrictions imposed by Dr. Lorenz. (PX5). Petitioner thereupon underwent injections on July 17, 2012. (PX4). Petitioner returned to Dr. Morgan on July 31, 2012 at which time it was noted that Petitioner had "zero improvement" from the injections. (PX5).

On August 21, 2012, Petitioner underwent a second set of injections noted as "bilateral sacroiliac joint injections." (PX5). Petitioner stated that she had no improvement from these injections either.

Petitioner returned to the Chicago Pain and Orthopedic Institute on September 4, 2012 where she saw Dr. Louis Demetrios. (PX5). Dr. Demetrios recommended repeat bilateral SI joint injections and advised that Petitioner remain off work. (PX5).

On October 17, 2012, Petitioner underwent her third set of injections. (PX4). Petitioner once again noted that the injections did not provide any relief. She indicated that this was the last time she received injections.

On February 11, 2013, Dr. Bernstein authored a third addendum report and opined that Petitioner's additional treatment was not the result of her work related injury on October 16, 2010. (RX4). Dr. Bernstein also opined that Petitioner was not a surgical candidate and that she can continue to work full duty without restrictions. (RX4).

Petitioner has not received any further medical care or treatment since October 17, 2012. Petitioner continues to have pain in the bottom part of her back and her legs go numb. At times her pain is "strong" and she uses hot patches on her back two-three times per week. Petitioner does not take prescriptive medication but does use Advil once a day. She indicated that she works six to seven hours a day, Monday through Saturday, or the same number of hours as before the accident. She also testified that she wears a support or brace for her back that keeps her body straight. On cross-examination, Petitioner noted that in order to perform her complete job activities she would be required to lift about 40 lbs. Petitioner also agreed that her job as a salad prep cook is of a light physical demand level. In addition, Petitioner indicated that she has continued to work for her concurrent employer, Flat Top Grill, doing the same type of food preparation while working light duty for the Respondent.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner suffered a back injury as a result of her slipping on oil on October 16, 2010. On the date of her fall she had pain in her back and her hips and two days later notified her supervisor Jessica that she had pain in the bottom part of her back and requested authorization to see a physician. The initial medical provider, Dr. Roza, indicated in the history that Petitioner fell on her back on October 16, 2010 and that she denied any previous injury or back complaints. Dr. Roza also noted that Petitioner had severe pain, that bending aggravated the pain and that she had severe tenderness and spasm in the thoracic area and severe tenderness in the lumbar area. (PX1). Dr. Roza opined that Petitioner's medical care was causally related to her accidental injury. (PX1, p.19).

A subsequent MRI of Petitioner's low back on March 24, 2011 indicated that she had a L5-S1 broad-based central disk protrusion without significant central spinal stenosis or encroachment of descending S1 nerve roots. (PX2, p.7). On May 24, 2011, Petitioner underwent a discogram that demonstrated discogenic pain at L5-S1. (PX4, pp.1-3).

Dr. Bernstein, Respondent's §12 examining physician, opined that Petitioner had "chronic persistent subjective complaints of low back pain following a fall on October 16, 2010" and that "pending seeing the results of her lumbar discogram, (the disc degeneration at the L5-S1 level) is likely responsible for her persistent symptoms." (RX1, p.2). In a later addendum, after reviewing the results of the lumbar discogram performed on May 24, 2011, Dr. Bernstein opined that "[b]ased on the results of this lumbar discogram, this patient likely has pain emanating from the L5-S1 disc level." (RX2).

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner suffered a herniated disk at L5-S1 as a result of the undisputed work accident on October 16, 2010 and that Ms. Hernandez's current condition of ill-being is causally related to said accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL

APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

The parties submitted into evidence an agreed stipulation outlining the medical expenses that would be due and owing pursuant to §8(a) and the fee schedule provisions of §8.2 of the Act in the event this matter was found to be compensable, with Respondent maintaining any and all objections to said bills on the basis of liability, reasonableness and necessity. (Arb.Ex #2).

In the present case, the record shows that following the accident Petitioner came under the care of chiropractor Dr. Roza followed by her second choice of medical provider, Dr. Lorenz of Hinsdale Orthopedic Associates. (PX2). Dr. Lorenz initially recommended conservative care. When that failed he recommended surgery in the form of a fusion at L5-S1. (PX2, pp.8-9). Respondent's §12 examining physician, Dr. Bernstein, initially agreed that fusion surgery was on option (RX1) only to change his mind and opine that surgery was not medically necessary. (RX3). Regardless, Petitioner opted not to undergo surgery. As a result, Dr. Lorenz recommended an FCE and eventually discharged Petitioner from his care after restricting her from work activities as demonstrated in the FCE. (PX2, p.14). Dr. Bernstein likewise relied on the results of the FCE to opine that Petitioner could return to work in her prior position without restriction. (RX3). No utilization review report was submitted with regard to Dr. Lorenz's treatment. Certainly, this treatment provided by Dr. Lorenz was reasonable and necessary in an attempt to alleviate Petitioner's symptoms and complaints.

Therefore, based on the above, and the record taken as a whole, and in light of the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner is entitled to reasonable and necessary medical services as provided in §8(a) and fee schedule provisions of §8.2 of the Act in the amount of $53,040.83 for services provided by Accredited Ambulatory Care, $3,121.73 for services provided by Chicago Pain & Orthopedic Institute, $265.29 for services provided by Injured Workers Pharmacy, $3,438.82 for services provided by Dr. Mark A. Lorenz, and $4,842.59 for services provided by Pinnacle Pain Management. (Arb.Ex.#2).

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

The record shows that Petitioner was initially restricted from work by Dr. Roza as of October 20, 2010 and that she remained off work until November 21, 2010 when she was released to light duty work by Dr. Lorenz.

Based on the above, and the record taken as a whole, as well as the Arbitrator's determination as to causation (issue "F", supra), the Arbitrator finds that Petitioner was temporarily totally disabled from October 20, 2010 through November 21, 2010, for a period of 4-5/7 weeks.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The record shows that as a result of the accident in question Petitioner suffered an L5-S1 disc herniation. The record further shows that following conservative treatment treating orthopedic surgeon Dr. Lorenz recommended that Petitioner undergo fusion surgery at L5-S1, an option that was initially endorsed by Respondent's §12 examining physician, Dr. Bernstein, only to be later retracted. Petitioner, given her fear of the procedure, opted not to proceed with surgery, as is her right. Instead, she was referred to pain management specialist Dr. Morgan where she received a series of three injections, without noticeable relief in her pain symptoms.

Dr. Lorenz last saw Petitioner on June 14, 2012 at which time he noted that Petitioner could return to work within the parameters of the FCE which had shown that she was capable of lifting 32 pounds on an occasional basis. (PX2).

Petitioner continues to work in her former position of food preparer, working six to seven hours a day, Monday through Saturday, or the same number of hours as before the accident. She noted that she currently notices pain throughout the day in the bottom part of her back, which she stated is sometimes strong. She indicated that she uses hot patches on her back two or three times a week for her pain and takes over the counter medicine once a day for same.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner suffered the permanent partial loss of use of 15% person-as-a-whole pursuant to §8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Dopkus,
Petitioner,
vs.

NO: 09 WC 13364

IDOT,
Respondent,

14IWCC0123

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of permanent partial disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 23, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

No bond or summons for State of Illinois cases.

DATED: FEB 19 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
O: 2/6/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DOPKUS, SCOTT
Employee/Petitioner

Case# **09WC013364**

14IWCC0123

IDOT
Employer/Respondent

On 7/23/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0190 LAW OFFICES OF PETER F FERRACUTI
THOMAS STROW
110 E MAIN ST PO BOX 859
OTTAWA, IL 61350

0639 ASSISTANT ATTORNEY GENERAL
CHARLENE C COPELAND
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CHICAGO, IL 60601

1430 CMS BUREAU OF RISK MGMT
WORKERS COMPENSATION MANAGER
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PKWY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUL 23 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

14IWCC0123

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

SCOTT DOPKUS
Employee/Petitioner

v.

IDOT
Employer/Respondent

Case # **09** WC **13364**

Consolidated cases: **N/A**

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Geneva**, on **May 14, 2013**. By stipulation, the parties agree:

On the date of accident, **January 14, 2009**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

On this date, Petitioner sustained an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned **$42,744.00**, and the average weekly wage was **$822.00**.

At the time of injury, Petitioner was **32** years of age, ***single*** with **0** children under 18.

Respondent remains liable for $1,102.63 in necessary medical services and reimbursement to Petitioner of $25.49 in out-of-pocket expenses awarded in the prior 19(b) decision.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

14IWCC0123

ORDER

Respondent shall pay Petitioner the sum of **$493.20**/week for a further period of **7.5** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **3% loss-of-use of Petitioner's left arm**.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

7/22/13
Date

ICArbDecN&E p.2

JUL 23 2013

14IWCC0123

FINDINGS OF FACT

On September 2, 2011, the Illinois Workers' Compensation Commission affirmed the decision of Arbitrator Giordano in a 19(b) proceeding under the Act. (PX1). At the time of the original trial, Respondent had stipulated that Petitioner's left forearm contusion was casually related to an undisputed accident on January 14, 2009. (PX2). The Commission found that Petitioner was at Maximum Medical Improvement as of May 20, 2010, for his causally related left forearm contusion and that all other claimed conditions were unrelated. The matter was thereafter returned to the arbitration level for further findings. Petitioner offered no further evidence at the time of hearing on the Nature and Extent of his injury, but rather relied on the original 19(b) Decision and Record as a basis for permanency. The Arbitrator hereby adopts and incorporates the Findings of Fact and Conclusions of Law from the original 19(b) proceeding into his current decision. (PX1).

Petitioner was found to be at Maximum Medical Improvement after unsuccessfully completing a Functional Capacity Evaluation on several occasions. However, Petitioner was consistently diagnosed with a left arm contusion, and again, his condition as of the date of trial was stipulated to be causally related. Petitioner further testified to his complaints on the day of hearing.

The Arbitrator has carefully considered the prior Commission Decision and reviewed the Record. Based upon the foregoing, the Arbitrator awards Petitioner 3% loss-of-use of his left arm for his undisputed left forearm contusion suffered as a result of an undisputed workplace injury in January 2009. All other aspects of the Commission's prior decision are hereby adopted and remain in effect for this decision.

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Shelia Leach,
Petitioner,
vs.

NO: 11 WC 21644

KOBYCO Inc.,
Respondent,

14IWCC0124

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, causal connection, prospective medical expenses, medical expenses and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 2, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 19 2014

Mario Basurto

David L. Gore

Stephen Mathis

MB/mam
O:2/6/14
43

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

LEACH, SHEILA
Employee/Petitioner

Case# **11WC021644**

14IWCC0124

KOBYCO INC
Employer/Respondent

On 7/2/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2489 LAW OFFICE OF JIM BLACK & ASSOC
TRACY L JONES
308 W STATE ST SUITE 300
ROCKFORD, IL 61101

2461 NYHAN BAMBRICK KINZIE & LOWRY PC
GARY J WALLACE
20 N CLARK ST SUITE 1000
CHICAGO, IL 60602

14IWCC0124

STATE OF ILLINOIS)
)SS.
COUNTY OF Winnebago)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Sheila Leach
Employee/Petitioner

v.

Kobyco, Inc.
Employer/Respondent

Case # 11 WC 21644

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Rockford**, on **May 14, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0124

FINDINGS

On **November 12, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$24,875.76**; the average weekly wage was **$478.38**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

ORDER

As the Arbitrator has found that the Petitioner failed to meet her burden of proof with regard to the issues of accident and causation, the Petitioner's claim for compensation is denied.

No benefits are awarded herein.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Arbitrator Anthony C. Erbacci

June 27, 2013
Date

JUL - 2 2013

FACTS:

The Petitioner testified that in November of 2010 she was employed with the Respondent, a window and garage door company, as a secretary. She testified that she had been employed by the Respondent since 1986 and that since 1990 she has held the job title of secretary. She testified that her job involved data entry, reception work, book keeping, and processing of orders. She described her work station and she described her job activities which included keyboarding, writing in ledgers, answering telephones, and using a fax machine frequently throughout the day. The Petitioner testified that her work day involved several different activities throughout the day, but that she was constantly using both of her hands. She testified that she spent about 40% of her day typing on the keyboard and 60% of her day handwriting information in various forms. She testified that she would also have to lift small boxes of hardware that would be brought in from various part suppliers..

The Petitioner testified that in November of 2010, she began to have problems with her hands falling asleep and having decreased grip strength. On November 12, 2010 the Petitioner sought treatment for her hands with her primary care physician, Dr. Paul Schroeder. The history noted by Dr. Schroeder was of a 50 year old patient who complains of possible carpal tunnel symptoms in both hands. It was reported that the symptoms had been present for 6 months or longer, that the left wrist was painful and that there was tenderness in the right forearm going up to the right shoulder. Numbness and tingling in the thumb and fingers was also reported. It was noted that the Petitioner reported that "she does work in a secretarial capacity and does a lot of keyboard entry." Dr. Schroeder diagnosed the Petitioner as having bilateral carpal tunnel syndrome and he ordered an EMG of both hands. He advised her to use wrist splints and to take over the counter medication for pain relief.

The EMG was done on January 2, 2011 and was reported to demonstrate bilateral median neuropathy of the wrist, predominately sensory, demyelinating, and right minimally worse than the left. There was no evidence of cervical radiculopathy or brachial plexopathy. Based on the results of the EMG, Dr. Schroeder referred the Petitioner to an orthopedic physician.

On February 21, 2011, in response to the Petitioner's request to do so, Dr. Schroeder authored a letter wherein he sated "I believe her condition is related to her work as a secretary so please consider this a work related injury". The Petitioner testified that she asked Dr. Schroeder to write a letter after being advised by her employer that they did not consider her condition to be work related. The Petitioner testified that she had discussed her job duties with Dr. Schroeder when she had seen him on November 12, 2010 and that he indicated at that time that her condition was work related. She testified that she sent him the letter asking him to place his opinion regarding causal relationship in writing so that she could tender it to her employer. The February 21, 2011 letter from Dr. Schroeder was his response to her written request.

At the request of the Respondent, the Petitioner was examined by Dr. John Fernandez on April 28, 2011. The transcript of Dr. Fernandez' deposition testimony was admitted into the record as Respondent's Exhibit 1. Dr. Fernandez testified that the Petitioner described her job activities to him and also demonstrated the "positional factors" of her wrists and elbows when she worked. Dr. Fernandez testified that the Petitioner reported that she keyboarded 40% of her workday and spent 60% doing other tasks. Dr. Fernandez opined that the Petitioner's bilateral carpal tunnel syndrome was not causally related to her work as a secretary for Respondent. Dr. Fernandez further opined that the Petitioner did not have any work factors which would be causative or aggravating to carpal tunnel syndrome. Dr. Fernandez noted that other factors contributed to the Petitioner's carpal tunnel syndrome. Specifically, Dr. Fernandez noted that the Petitioner's increased weight, diabetes, and thyroid disease were all risk factors in the development of carpal tunnel syndrome. Dr. Fernandez also noted that the Petitioner did not use any exaggerated flexion or any exaggerated force in the performance of her secretarial duties. Dr. Fernandez did agree that surgery was appropriate for the Petitioner's bilateral carpal tunnel condition.

On July 25, 2011, the Petitioner came under the care of Dr. Scott Nyquist, an orthopedic surgeon. Dr. Nyquist noted a history of a 51 year old, right handed female who had pain, numbness, and tingling in both of her hands for approximately a year. He recorded a history that she was a secretary and does a lot of repetitive type tasks and has been with the company for several years. He noted that she was still performing her job at the time he saw her. Dr. Nyquist diagnosed bilateral carpal tunnel syndrome, diabetes, and hypothyroidism and he recommended that the Petitioner undergo surgery for both hands. He further stated in the record "I feel it is related to the repetitive type tasks she does at work."

The Petitioner underwent the right carpal tunnel release on August 31, 2011 followed by the left carpal tunnel release on October 18, 2011. The parties stipulated that the Petitioner was off of work from August 30, 2011 to September 6, 2011 following the first surgery and from October 18, 2011 to October 23, 2011 for the second surgery. No temporary total disability benefits were paid during that time.

The Petitioner testified that she last saw Dr. Nyquist on October 25, 2011, at which time he released her at maximum medical improvement. She has not been back to Dr. Nyquist, Dr. Schroeder, or any other physician for her hands since being released. She testified that her hands are much improved following the surgeries. However she still has tenderness over the incision and decreased pinch grip strength. This causes her to drop small items such as make-up brushes and pens frequently. On cross-examination, the Petitioner admitted to other health issues including diabetes, thyroid disease and weight issues.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, and (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

It is axiomatic that the Petitioner bears the burden of proving all of the elements of her claim by a preponderance of the credible evidence. The Petitioner here relies upon the opinion generated by Dr. Schroeder and the opinion of Dr. Nyquist contained in his treatment records. Neither doctor testified at trial. The opinion generated by Dr. Schroeder is in a letter dated February 21, 2011 directed to "To Whom It May Concern". This letter was written in response to the Petitioner's request that Dr. Schroeder resubmit his diagnosis stating that the condition was work related. The opinion of Dr. Nyquist is contained in his initial treatment record of July 25, 2011. Dr. Schroeder's opinion letter indicates that the Petitioner "works in a secretarial capacity" and Dr. Nyquist's note indicates that "She is a secretary and does a lot of repetitive type tasks." Neither Dr. Schroeder's records nor Dr. Nyquists records contain any notation or description of the Petitioner's actual specific job duties or activities. Neither Dr. Schroeder's records nor Dr. Nyquists records contain any notation or description of the "positional factors" of the Petitioner's wrists and elbows when she worked.

While the Arbitrator notes the Petitioner's testimony that she "discussed" her job duties with Dr. Schroeder and "described" her job duties to Dr. Nyquist, there is nothing in the records of either of those physicians which indicates that they did, in fact, have an accurate understanding of the Petitioner's actual job activities. Dr. Fernandez, however, testified that in addition to describing her job duties and activities to him the Petitioner also demonstrated the "positional factors" of her wrists and elbows.

Dr. Fernandez testified that the Petitioner's bilateral carpal tunnel syndrome was not causally related to her work as a secretary for Respondent. Dr. Fernandez further testified that the Petitioner did not have any work factors which would be causative or aggravating to carpal tunnel syndrome. Dr. Fernandez testified that the Petitioner's increased weight, diabetes, and thyroid disease were all risk factors in the development of carpal tunnel syndrome and he opined that these other factors contributed to the Petitioner's carpal tunnel syndrome. Additionally, Dr. Fernandez noted that the Petitioner did not use any exaggerating flexion or used any exaggerating force in the performance of her secretarial duties.

As it is not clear from the record that either Dr. Schroeder or Dr. Nyquist had an accurate understanding of the Petitioner's actual job duties and activities, the Arbitrator questions the reliability of those opinions. While the Arbitrator notes that Dr. Fernandez examined the Petitioner at the request of the Respondent, his testimony demonstrates that he did have an understanding of the Petitioner's actual job duties and activities as well as the "positional factors" of her wrists and elbows when she performed those activities. In light of

the opinions of Dr. Fernandez and the questionable reliability of the opinions of Dr. Schroeder and Dr. Nyquist, the Arbitrator finds that the opinions of Dr. Schroeder and Dr. Nyquist are not sufficiently reliable and persuasive so as to satisfy the Petitioner's burden of proof.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner failed to prove that an accident occurred that arose out of and in the course of her employment with the Respondent. The Arbitrator further finds that the Petitioner failed to prove that her current condition of ill-being is causally related to her job activities with the Respondent.

As the Arbitrator has found that the Petitioner failed to meet her burden of proof with regard to the issues of accident and causation, determination of the remaining disputes issues is moot.

The Petitioner's claim for compensation is denied.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy Harris,

Petitioner,

14IWCC0125

vs.

NO: 11 WC 25456

Flying Food Fare, Inc. ,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, prospective medical care, evidentiary rullings, did Petitioner exceed his choice of medical providers, and penalties and attorney's fees, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 14, 2014 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

14IWCC0125

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 20 2014

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

MJB:bjg
0-2/10/2014
52

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR
8(a)

14IWCC0125

HARRIS, TIMOTHY
Employee/Petitioner

Case# 11WC025456

FLYING FOOD FARE INC
Employer/Respondent

On 5/14/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2194 STROM & ASSOCIATES
LINDSEY STROM
180 N LASALLE ST SUITE 2510
CHICAGO, IL 60601

0532 HOLECEK & ASSOCIATES
STAURT PELLISH
161 N CLARK ST SUITE 800
CHICAGO, IL 60601

14IWCC0125

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- ☐ Injured Workers' Benefit Fund (§4(d))
- ☐ Rate Adjustment Fund (§8(g))
- ☐ Second Injury Fund (§8(e)18)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) 8(a)

Timothy Harris
Employee Petitioner

v.

Flying Food Fare, Inc.
Employer/Respondent

Case # **11** WC **25456**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on March 11. 2913. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☐ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other Necessity of prospective medical care; P. Did Petitioner exceed his choice of physicans?

FINDINGS

On **5/12/2011**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**17,992.00**; the average weekly wage was $**344.00**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **1** dependent child.

Petitioner ***has not*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

Respondent shall pay for Petitioner reasonable and necessary medical services, in the amount of $1,845.00 and shall pay all reasonable and necessary future medical expenses, as provided in Section 8(a) and 8.2 of the Act.

Penalties and attorney's fees are not awarded.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

May 13, 2013

MAY 14 2013

TIMOTHY HARRIS
11 WC 25456

FINDINGS OF FACT

The disputed issues in this matter are: 1) causal; connection; 2) medical bills; 3) has the petitioner exceeded his choice of physicians; 4) prospective medical services; 5) penalties; and 6) attorney's fees. *See*, AX1.

Petitioner testified that on May 11, 2011, he was working as a porter for Respondent, Flying Foods Fare, Inc. and that his job duties included cleaning, mopping, scrubbing, and lifting boxes that weigh approximately ten to fifteen (10-15) pounds. Petitioner testified that he worked for the Respondent for approximately 2 & 1/2 to 3 years exclusively as a porter. *See*, TX pgs. 10-12.

Petitioner further testified that on the date of the accident, he reported to work at his usual time of 5:00 a.m. He was bending over to clean and drain the sewers when he slipped on grease in the kitchen and hit his right knee on the edge of the sewer. Petitioner testified that he felt a lot of pain subsequent to the accident and stated that he tried to "walk off" the pain because he did not think it would last long.

Petitioner testified that he did not report the accident to anyone on May 11, 2011, because he "did not think it was a big deal". Petitioner continued to work the rest of his shift on that day, even though he continued to have pain in his right knee. Petitioner testified that he did not seek immediate medical attention because he did not think that he had injured himself badly. Petitioner testified that after he had returned home from work, he began to feel more pain and his right knee became stiff. *See*, TX pgs. 13-14.

Petitioner testified that he reported the injury to his supervisor, Tim Gaddis, who did not direct Petitioner to any hospital or occupational health clinic for treatment. Petitioner testified that he went to St. Anthony's Hospital and sought treatment on his own, on May 18, 2011. At the hospital, Petitioner provided the

same history of accident as described at trial and in the initial reports completed for his employer. The records state that Petitioner followed up with the work nurse and she told him to go to the emergency room. Upon physical examination, it was noted that Petitioner had right knee swelling and pain with walking. Per the medical notes, Petitioner described sharp pain and tenderness to the right knee, both medially and laterally. He was treated and released. *See,* PX4 & TX p. 18.

Petitioner testified that he was referred to Advanced Occupational Medicine Specialists ("AOMS") and examined by Dr. Khanna, on June 15, 2011. Dr. Khanna noted the same history of the accident that Petitioner provided at trial. Upon physical examination, Dr. Khanna reported that the lateral joint line was tender to palpation on the right side of the knee and that there was a positive squat test on the right. Dr. Khanna further noted that there was a 3.5 x 3.0 cm cystic mass noted on the right lateral knee, with tenderness to palpation. *See,* PXs 4, 5 & TX p. 20.

Dr. Khanna ordered an MRI of the right knee, which was performed on June 16, 2011, at Athletic Imaging. Per the radiologist's report, this MRI was interpreted to reveal trace effusion and a mild increased signal in the interior and posterior horns of the lateral meniscus. The medial meniscus demonstrated a mild increased signal, anteriorly and posteriorly, but it was noted that there was no evidence of a lateral meniscal tear. There was grade II-III chondromalacia within the medial and lateral tibiofemoral compartments and mild joint space narrowing with mild osteophyte formation. A multiobulated cystic structure was identified along the inferior margin of the lateral patellar retinaculum and seen along the posterior margin of the patellar tendon, posterior to the tendon. The radiologist noted that it might represent a soft-tissue ganglion cyst and opined that due to the atypical location of the lesion; post-contrast imaging was necessary for further evaluation. *See,* PX 5.

14IWCC0125

Petitioner testified that Dr. Khanna referred to him Dr. Christos Giannoulias of G&T Orthopaedics and Sports Medicine. Petitioner began treatment with Dr. Giannoulias on July 5, 2011 and the doctor's report, from that office visit, relates the same mechanism of injury that Petitioner previously reported and recounted at trial. Dr. Giannoulias' report states that Petitioner has a cystic mass over the anterolateral aspect of the right knee and that he did not report any problems with his knee prior to the injury. Petitioner was diagnosed with a right knee ganglion cyst and during this office visit; Dr. Giannoulias aspirated 2 cc's of fluid from Petitioner's right knee. Petitioner received two more injections during the course of his treatment with Dr. Giannoulias and Petitioner testified that the injections helped his knee initially, but then his pain returned. *See*, TX p.20-21 & PX6.

On July 14, 2011, Petitioner returned to Dr. Giannoulias and reported that the asipiration did not fully relieve the right knee symptoms and that the ganglion cyst recurred. Dr. Giannoulias re-examined Petitioner and opined that there was tenderness over the anterolateral joint line. He noted that there was pain with McMurray's maneuver and that Petitioner had trouble with full extension and full flexion. At this time, Dr. Giannoulias added an additional diagnosis of meniscus tear and ganglion cyst of the right knee and recommended arthroscopic excision of the cyst. Petitioner indicated that he wished to proceed. Petitioner testified that Dr. Giannoulias continued to recommend surgery but that this procedure was never performed because the insurance company did not provide authorization. Petitioner testified that he does not have group health insurance and therefore, could not proceed with surgery on his own. Petitioner testified that he continued to work on light duty while treating with Dr. Giannoulias because Respondent was accommodating the doctor's light duty restrictions. *See*, PX6 & TX pp. 20-22.

On September 27, 2011, Dr. Giannoulias reported that Petitioner's symptoms were not improving and he explained that the only other treatment for the

petitioner was the excision of the cyst with arthroscopic evaluation of the cartilage surface. Dr. Giannoulias opined that the cyst had developed after the trauma and there is no evidence to believe otherwise.

In Dr. Giannoulias' March 8, 2012 note, he once again recommended arthroscopy to address the lateral meniscus tear and cyst since Petitioner had failed conservative treatment. He opined that Petitioner was not doing well and was having difficulty with most of his daily activities. He also stated that Petitioner's condition was not degenerative and was directly related to his work injury.

Petitioner testified that he continues to have pain and stiffness in his right knee. He testified that he continues to feel a burning sensation inside his knee. Petitioner testified that he did not have right knee pain or symptoms prior to the date of the accident. He also testified that he had not sought any medical treatment for right knee pain prior to the date of the accident. Furthermore, Petitioner testified that he did not notice any bulges in his right knee prior to the date of the accident. *See*, TX p. 23.

CONCLUSIONS OF LAW

F. Is Petitioner's present condition of ill-being is causally related to the injury:

It is within the province of the Commission to determine the factual issues, to decide the weight to be given to the evidence and the reasonable inferences to be drawn there from; and to assess the credibility of witnesses. *See, Marathon Oil Co. v. Industrial Comm'n*, 203 Ill. App. 3d 809, 815-16 (1990). And it is the province of the Commission to decide questions of fact and causation; to judge the credibility of witnesses and to resolve conflicting medical evidence. *See, Steve Foley Cadillac v. Industrial Comm'n*, 283 Ill. App. 3d 607, 610 (1998).

It is undisputed that Petitioner was performing his regular duties of employment for Respondent on May 11, 2011; and that he experienced pain in his right knee subsequent to a fall on a sewer drain, while performing that work. As Petitioner's symptoms worsened, he sought medical treatment at St. Anthony's Hospital and provided a consistent history of accident and complaints. When Petitioner's symptoms failed to improve, Respondent referred him for treatment at Advanced Occupational Medicine Specialists. Dr. Khanna referred Petitioner to an orthopaedic specialist, Dr. Giannoulias; and he underwent a course of conservative treatment. Petitioner continued to work for the Respondent within light duty restrictions while undergoing treatment. Dr. Giannoulias diagnosed Petitioner with a right knee meniscal tear and ganglion cyst noting that Petitioner had no right knee complaints prior to the date of the accident.

The Arbitrator relies on the medical reports and the credible deposition testimony of Petitioner's treating physician, Dr. Giannoulias. He testified that on July 5, 2011, the first date that he evaluated Petitioner, there was pain and swelling over the anterior lateral aspect of the right knee; the exact place

Petitioner struck his knee on the sewer. Dr. Giannoulias added that Petitioner complained of tenderness any time that he touched it. Dr. Giannoulias further testified that Petitioner had a cystic structure over the anterior lateral joint line that was tender to compression and he also had tenderness over the anterior lateral joint line, the lateral meniscus; as well as over the medial joint line. Dr. Giannoulias testified that the subjective complaints were supported by the objective findings and that most of Petitioner's pain was focused directly on the cystic structure over the anterior lateral aspect. He further noted that Petitioner had pain with circumduction and this correlated with the subjective complaints. Dr. Giannoulias' opinion was that the ganglion cyst was caused as a direct result of the work accident. This is because Petitioner had denied any prior problems with his knee and that he noticed swelling and pain two days after the injury.

Dr. Giannoulias re-evaluated Petitioner on July 14, 2011. Dr. Giannoulias testified that Petitioner continued to have tenderness over the anterior lateral joint line and that the cyst had recurred. Dr. Giannoulias believed that Petitioner still had the ganglion cyst, but also believed that clinically, the meniscus was a problem because there was tenderness and pain with McMurray's maneuver. He opined that based upon the MRI findings and the physical examination that the ganglion cyst and meniscus tear were correlating; and surgery was recommended. *See,* PX8, pgs. 12-13; PX6.

The petitioner was examined, by request of Respondent, by Dr Miller, who opined that the cyst was not related to the accident. Dr. Giannoulias testified that he disagreed with Dr. Miller's diagnosis of Petitioner's injury as well as Dr. Miller's opinion that there is no causal connection. Dr. Giannoulias noted, "there is no evidence in the medical records or by Mr. Harris' history that he had any difficulty with his knee prior to the injury". Dr. Giannoulias believed that the swelling in Petitioner's right knee was consistent with a cyst that developed a couple days after the injury per Petitioner's history. Dr. Giannoulias testified that the meniscal or retinacular cysts seen on Petitioner's MRI are very common with

trauma, and that Dr. Miller's belief that all of these types of cysts are degenerative was "absolutely not true". *See,* PX 8, pgs. 14, 15.

As recommended by Dr. Miller's IME report, Dr. Giannoulias provided another cortisone injection to Petitioner's knee, on September 12, 2011. Petitioner followed-up with Dr. Giannoulias on September 27, 2011 and he continued to complain of pain over the anterior lateral aspect of the knee and over the cyst. Dr. Giannoulias testified that the physical examination findings were essentially unchanged and that he again recommended surgery, as he believed it to be medically necessary. *See,* PX 8, p. 17-19.

The Arbitrator finds that Dr. Giannoulias' opinion is more credible and holds more weight than the Respondent's expert, Dr. Miller. Dr. Miller did not dispute that there were objective findings on Petitioner's examination, at the time of the Independent Medical Examination ("IME"). He noted during the deposition that Petitioner's examination did show pain, hypersensitivity and that Petitioner was limping. Dr. Miller opined that the cyst was "totally unrelated" to the work accident. Dr. Miller stated in his report as well as during his deposition, that the relationship between the cyst and the fall at work was "mere coincidence". Dr. Miller admitted that he had no medical evidence to show that Petitioner had the cyst prior to the date of accident. Additionally, Dr. Miller acknowledged that Petitioner told him that he was asymptomatic prior to the date of the accident. *See,* RX 1, pgs. 8, 14-17; 32 & RX 1-A. *Also see,* TX pgs. 32, 34; RX 1-A pg. 15.

On cross-examination of Dr. Miller, he admitted that he did not have the medical records from St. Anthony's Hospital, where Petitioner first sought medical treatment subsequent to the work injury. Dr. Miller testified that according to the medical records, Petitioner waited "at least a week or perhaps longer" to seek medical treatment.

The Arbitrator notes that Petitioner's medical records admitted into evidence from St. Anthony Hospital show that he was admitted on May 18, 2011. Dr. Miller admitted that just because someone injures him or herself and does not seek treatment on that particular date, does not necessarily mean that they do not have any pain on the accident date. *See,* PX 6; & RX 1, pgs. 6-24.

Dr. Miller stated several times throughout the deposition, as well as in his report, that he has never heard of a ganglion cyst being caused by a traumatic event. The doctor attempted to show that he had literature on this subject to prove that a ganglion could not be caused by trauma; however, the literature that the doctor read aloud did not corroborate his opinion. Dr. Miller read from a pamphlet on ganglion cysts authored by the American Society for Surgery of the Hand and "Operative Hand Surgery", by David Green. While reading directly from the "Operative Hand Surgery" literature, he stated, "the etiology and pathogenesis of ganglion remains obscure and review of the literature indicates the confusion exists". He added that, "although the pathogenesis of ganglions has never been satisfactorily explained, surgical treatment can be undertaken with confidence". When asked if he wanted to retract his earlier statement whether trauma could "never" be the cause of a ganglion cyst, Dr. Miller proclaimed that he was going to stand by his original statement. *See,* RX1, pgs. 34-43; RX1, p. 14; & RX1-A.

Dr. Miller stated during his deposition that if the cyst was symptomatic, it would have responded to the aspiration, at least temporarily. The Arbitrator noted that Petitioner testified and Dr. Giannoulias' records corroborate, that the injections did temporarily alleviate Petitioner's pain complaints. Dr. Miller opined in his report and again during the deposition that based upon Petitioner's symptoms that surgery is reasonable and appropriate. However, Dr. Miller believed that there is no causal relationship between the cyst and the work incident and that the ganglion cyst was present all along. It was Dr. Miller's professional opinion that "this is a simple coincidence. This ganglion was there and he simply never noticed it before the incident in question". *See,* RX 1, p. 15; 57-63; RX 1-A.

It is well settled in medical literature that the cause of ganglion cysts is not known. One theory suggests that trauma causes the tissue of the joint to break down, forming small cysts, which then join into a larger, more obvious mass. The most likely theory involves a flaw in the joint capsule or tendon sheath that allows the joint tissue to bulge out. In addition, most ganglion cysts cause some degree of pain, usually following acute or repetitive trauma therefore, suggesting an aggravation of a pre-existing condition. For Dr. Miller, to unequivocally state, that such cysts cannot be caused by trauma when his own literature states that the causes of such cysts are vague; results in the Arbitrator finding that Dr. Miller's testimony, with regard to causality, is less than credible.

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to his May 11, 2011, work injury. In support of this finding, the Arbitrator relies on the unrebutted, credible testimony of Petitioner; medical records from St. Anthony's Hospital, Advanced Occupational Medicine Specialists, G&T Orthopedics & Sports Medicine, Cook County Stroger Hospital; and Dr. Giannoulias' testimony. Therefore, the Arbitrator finds that because the cystic mass was a result of the work-related accident, Respondent is hereby ordered to approve the surgery requested by Dr. Giannoulias.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Because the Arbitrator found that Petitioner's accident was causally connected to his current condition of ill-being, the Arbitrator finds that Respondent is liable for all necessary medical bills that are related to Petitioner's work injury; namely, bills from G&T Orthopaedics totaling $1,845.00.

M. Should penalties or fees be imposed upon Respondent?

The Arbitrator does not find that Respondent's failure to authorize and pay for said surgical procedure ordered by Dr. Giannoulias rises to the level of unreasonable, vexatious and without good cause, therefore no penalties of attorney's fees are awarded.

O. Is there a necessity for prospective medical care?

Having found causal connection of the accident and Petitioner condition of ill-being; the Arbitrator orders Respondent to authorize surgery as recommended by Dr. Giannoulias as well as any reasonably related prospective medical care subsequent to that procedure.

P Did Petitioner exceed his choice of physicians?

The Arbitrator finds that Petitioner did not exceed his choice of physicians. Petitioner initially went to St. Anthony's Hospital subsequent to the work-related injury. Petitioner testified that he was referred to AOMS by the Respondent. Petitioner was referred to G&T Orthopaedics from AOMS and treated with Dr. Giannoulias. Because Dr. Khanna referred Petitioner to Dr. Giannoulias, this is within the chain of referral and Petitioner may continue to treat with Dr. Giannoulias.

Respondent is responsible for Dr. Giannoulias' medical bills that have been incurred to date, as well as the prospective medical bills as they relate to Petitioner's right knee injury. Petitioner sought treatment at Stroger Hospital because he continued to have pain in his right knee and Respondent refused to authorize further treatment with Dr. Giannoulias. Petitioner's first choice of

doctor would be AOMS, who then referred him to Dr. Giannoulias. Stroger would be Petitioner's second choice.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Patricia Vargas,

Petitioner,

14IWCC0126

vs.

NO: 12 WC 38709

Lifetouch Portrait Studio,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, and prospective medical care,0 and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 18, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

14IWCC0126

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 2 0 2014

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

MJB:bjg
0-2/10/2014
52

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0126

VARGAS, PATRICIA
Employee/Petitioner

Case# 12WC038709

LIFETOUCH PORTRAIT STUDIOS INC
Employer/Respondent

On 7/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0290 KARCHMAR & STONE
GARY P STONE ESQ
111 W WASHINGTON ST SUITE 1030
CHICAGO, IL 60602

2337 INMAN & FITZGIBBONS
KEVIN DEUSCHLE
33 N DEARBORN SUITE 1825
CHICAGO, IL 60602

14IWCC0126

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Case # 12 WC 38709

Patricia Vargas
Employee/Petitioner

v.

Lifetouch Portrait Studios, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **David Kane**, Arbitrator of the Commission, in the city of **Chicago**, on **6/26/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **Lifetouch Portrait Studios, Inc.**. Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**41,860**; the average weekly wage was $**805.00**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **1** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**5,711.41** under Section 8(j) of the Act.

ORDER

Respondent shall be given a credit of $5,711.41 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay reasonable and necessary medical services of $(see attached), as provided in Section 8(a) of the Act.

Respondent shall pay all reasonable and necessary prospective medical services as provided in Section 8(a) of the Act see attached).

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment: however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

David A. Kane
Signature of Arbitrator

July 18, 2013
Date

ICArbDec19(b)

JUL 18 2013

STATEMENT OF FACTS

The Arbitrator observed the demeanor of the Petitioner and manner in which she testified and responded to questions, both during direct and cross examination and finds her credible.

As testified, the Petitioner sustained injuries to her left hip on January 26, 2012 while working for the Respondent performing her duties as a studio manager and photographer at the Respondent's photography studio located at 2656 N. Elston Avenue, Chicago, Illinois. Petitioner has been working for the Respondent for approximately 13½ years. Her usual work week consists of 40 hours, but fluctuates between 40 and 60 hours during busy season. Petitioner's duties consist of hiring, firing, creating the work schedule, photography, training and other administrative duties, including inventory. When she is performing her duties as a photographer, she is required to be very active including taking photographs from her knees.

Petitioner testified that at approximately noon on January 26, 2012 she was at Respondent's studio and was performing inventory work in the storage area where the floor was slippery. This required her to get on a ladder to count frames and other items at the studio. She was on the 2nd step of the ladder and while descending, she missed the 1st step causing her left leg to over extend. She immediately noticed pain in her left hip.

She reported this incident and completed the required Employee Incident/Injury Report that day. (Petitioner's Exhibit 1). She did not see a physician that day as she thought she may have just strained or pulled a muscle. She continued to work over the next several weeks but the left hip pain remained steady. She decided to call Dr. Brian Cole who treated her for a left knee injury several years earlier. Dr. Cole referred the Petitioner to Dr. Nho since he was better able to treat a hip injury.

On February 27, 2012 the Petitioner first saw Dr. Nho and provided him with a history of the occurrence, specifically that she felt she had over extended her left leg while stepping down from a ladder. Further, she stated she was experiencing sharp pain in her left hip. She thought it would go away, but the pain persisted. Dr. Nho's record of February 27, 2012 reflects the prior left knee history and indicates that she had no issues related to the left hip other than some occasional achiness around the hip following the left knee injury. (Petitioner's Exhibit 2). Dr. Nho notes that the pain is worse with pivoting, twisting, turning and crossing her legs and that she feels like her hip is coming out. (Petitioner's Exhibit 2). He further noted that Petitioner tried oral anti-inflammatories, activity modification and ice. (Petitioner's Exhibit 2). Dr. Nho recommended that Petitioner undergo an MR arthrogram to determine if a labral tear exists. (Petitioner's Exhibit

2). Of note, the Petitioner completed a General Intake Form at the initial visit with Dr. Nho on February 27, 2012 in which she indicated that this is a work related injury. (Petitioner's Exhibit 2). Additionally, a Hip Survey was completed on that date in which Petitioner provided the history of the injury from January 26, 2012 and indicated that there was no prior history. Moreover, the Petitioner rated the function of her hip prior to the injury as a 10 (normal). (Petitioner's Exhibit 2). The MR arthrogram was performed on March 28, 2012 and Petitioner returned to Dr. Nho on April 16, 2012. (Petitioner's Exhibit 2). Dr. Nho recommended an injection which was performed on June 4, 2012. (Petitioner's Exhibit 2). Thereafter, Dr. Nho recommended physical therapy which Petitioner underwent at Athletico, the same facility where she was treated for her left knee injury several years earlier. (Petitioner's Exhibits 2 and 4). Dr. Nho further stated that Petitioner has a symptomatic hip labral tear with an underlying diagnosis of femoroacetabular impingement, which was exacerbated by her work injury on January 26, 2012. (Petitioner's Exhibit 2).

At the outset of physical therapy, Petitioner completed an Outpatient Screening Form in which she indicated that the problem area was her left hip and that the symptoms started on January 26, 2012. (Petitioner's Exhibit 4). But, an initial therapy evaluation note dated July 17, 2012 states

that Petitioner feels that her current left hip injury is due to lingering problems stemming from her left knee surgery and that her left hip was thrown out during therapy. (Petitioner's Exhibit 4). However, immediately following that comment, the therapist notes that on January 26, 2012 Petitioner was stepping off a step ladder at work and slipped. She felt a stretching type pain in her left hip and that the pain has not gotten better. (Petitioner's Exhibit 4). Petitioner testified that she did not injure her left hip prior to January 26, 2012 and that she only experienced occasional stiffness in her left leg, including her left hip, after the left knee injury, but that was just muscular. She further testified that she did not experience any hip pain, symptoms or problems after being discharged from care for her left knee in 2010. Petitioner testified that the note associating her left hip pain to her prior left knee injury is incorrect. A review of the medical records from Dr. Brian Cole and Athletico from 2009 and 2010 following her left knee injury in November 2009 are void of any left hip complaints whatsoever and corroborate the Petitioner's testimony. (Petitioner's Exhibit 3 and 4).

As a result of physical therapy and the injection, it appears that some temporary relief was experienced but then the persistent pain returned. On July 30, 2012, Dr. Nho evaluated the Petitioner and indicated that all

nonsurgical treatment was exhausted. His recommendation was that Petitioner undergo a left hip arthroscopy, labral repair, possible acetabular rim trimming, femoral osteochondroplasty and capsular plication. (Petitioner's Exhibit 2). Respondent then scheduled an IME with Dr. Kevin Walsh on September 27, 2012.

It appears that Dr. Walsh is of the opinion that any complaints the Petitioner has with regard to her left hip are related to her pre-existing femoral acetabular impingement and not the incident of January 26, 2012. (Respondent's Exhibit 1). However, he did not express any opinion as to whether the incident of January 26, 2012 exacerbated the underlying condition. (Respondent's Exhibit 1). Dr. Walsh did note that the Petitioner can consider surgical intervention as recommended by Dr. Nho as she underwent a long course of conservative care. (Respondent's Exhibit 1). He further stated that treatment to date has been reasonable. (Respondent's Exhibit 1). In his report, Dr. Walsh did not specify which medical records he reviewed, although it is clear he did not review the medical records of Dr. Cole and Athletico which contain the treatment details stemming from the Petitioner's prior left knee injury. (Respondent's Exhibit 1). Moreover, given the date of the IME report (October 4, 2012), Dr. Walsh did not review any of the medical records subsequent thereto,

including the medical records of Dr. Nelson, Dr. Domb and the second MR arthrogram performed on April 1, 2013. (Respondent's Exhibit 1).

Petitioner testified that after her IME with Dr. Walsh, Dr. Nho would no longer see her as workers' compensation would not approve any treatment. She further testified that Dr. Nho would not accept her health insurance and even declined to see her when she offered to pay for the visit herself. In need of medical treatment, Petitioner sought the help of Dr. Dirk Nelson who was referred to her by Dr. Perns, a physician who was treating a family member. On March 12, 2013 Dr. Nelson evaluated the Petitioner and noted the history of her injury that began on January 26, 2012. (Petitioner's Exhibit 5). Dr. Nelson opined that it was somewhat likely that the Petitioner does have some type of labral pathology causing persistent symptoms and agreed with Dr. Nho that a diagnostic arthroscopy and possible labral repair was indicated. (Petitioner's Exhibit 5). Since Dr. Nelson does not specialize in the hip, he referred the Petitioner to "Dr. Benjamin Domb who does a lot of hip arthroscopy for his opinion". (Petitioner's Exhibit 5).

On March 18, 2013, Dr. Domb evaluated the Petitioner and noted the history of the injury to the left hip beginning after an incident when she was doing inventory at work in January 2012. (Petitioner's Exhibit 6). After

examining the Petitioner, it appears that Dr. Domb reviewed the MR arthrogram film from March 28, 2012 and noted that it shows an anterosuperior labral tear that was not read by the radiologist. (Petitioner's Exhibit 6). Dr. Domb concurred with Dr. Nho that arthroscopy was appropriate, but requested a new MR arthrogram of better quality. (Petitioner's Exhibit 6). On April 1, 2013 an MR arthrogram of the left hip was performed which revealed an anterior labral tear. (Petitioner's Exhibit 6). On April 2, 2013, Dr. Domb confirmed the tear and stated that the tear was caused by the injury. (Petitioner's Exhibit 6). He further noted the slight acetabular retroversion and stated that it was not caused by the injury nor was it in and of itself the cause of her hip problem. (Petitioner's Exhibit 6). On April 25, 2013, Dr. Domb met with the Petitioner and recommended arthroscopic repair. (Petitioner's Exhibit 6). The surgery is pending approval.

Petitioner testified that she continues to work full duty, with pain, but desires to have the recommended treatment to alleviate her left hip symptoms.

CONCLUSIONS OF LAW

The Arbitrator finds that an accident occurred that arose out of and in the course of the Petitioner's employment by the Respondent and in support thereof adopts Petitioner's Exhibits 1 through 6 and further finds as follows:

The Petitioner testified credibly and the evidence presented by Petitioner demonstrates that an accident occurred on January 26, 2012 that arose out of and in the course of the Petitioner's employment by the Respondent. Petitioner testified that she was employed by the Respondent as a studio manager and photographer on and prior to January 26, 2012. Her duties consist of hiring, firing, creating the work schedule, photography, training and other administrative duties, including inventory. Petitioner testified that at approximately noon on January 26, 2012 she was at Respondent's studio and was performing inventory work in the storage area where the floor was slippery. This required her to get on a ladder to count frames and other items at the studio. She was on the 2nd step of the ladder and while descending, she missed the 1st step causing her left leg to over extend. She immediately noticed pain in her left hip. She reported this incident and completed the required Employee Incident/Injury Report that day. (Petitioner's Exhibit 1). This history of injury was noted by the

medical providers who treated the Petitioner subsequent to January 26, 2012. (Petitioner's Exhibits 2, 4, 5 and 6). Even the Respondent's IME physician, Dr. Kevin Walsh, notes the incident in his report of October 4, 2012. (Respondent's Exhibit 1).

Accordingly, based upon the Petitioner's testimony and the documentary evidence contained in the Petitioner's exhibits 1, 2, 4, 5, and 6, all of which are unrefuted, the Arbitrator finds that an accident occurred that arose out of and in the course of the Petitioner's employment by the Respondent.

As to the issue of whether the Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds that the Petitioner's current condition of ill-being as to her left hip is causally related to the injury and in support thereof adopts Petitioner's Exhibits 1 through 6.

The Petitioner testified credibly and the evidence presented by Petitioner demonstrates that the Petitioner's current condition of ill-being is causally related to the injury.

Petitioner testified that she had never injured her left hip prior to January 26, 2012. As previously noted, the Petitioner was injured when she was on the 2nd step of a ladder taking inventory for the Respondent

and while descending, she missed the 1st step causing her left leg to over extend. She immediately noticed pain in her left hip. She reported this incident and completed the required Employee Incident/Injury Report that day. (Petitioner's Exhibit 1). The incident report clearly states the manner in which the accident occurred, identifies the body part affected (left hip) and describes the nature of the injury as "over extended so I think just strain". (Petitioner's Exhibit 1). The Petitioner then notes that she is not seeking medical treatment as of now. (Petitioner's Exhibit 1). Petitioner testified that the left hip pain steadily persisted in the weeks following the accident so she called Dr. Cole, a physician who treated her left knee injury several years prior. Dr. Cole referred her to Dr. Nho who was better able to treat a hip injury.

On February 27, 2012 the Petitioner first saw Dr. Nho and provided him with a history of the occurrence, specifically that she felt she had over extended her left leg while stepping down from a ladder. Further, she stated she was experiencing sharp pain in her left hip. She thought it would go away, but the pain persisted. Dr. Nho's record of February 27, 2012 reflects the prior left knee history and indicates that she had no prior issues related to the left hip other than some occasional achiness around the hip following the left knee injury. (Petitioner's Exhibit 2). Dr. Nho notes

that the pain is worse with pivoting, twisting, turning and crossing her legs and that she feels like her hip is coming out. (Petitioner's Exhibit 2). He further noted that Petitioner tried oral anti-inflammatories, activity modification and ice. (Petitioner's Exhibit 2). Dr. Nho recommended that Petitioner undergo an MR arthrogram to determine if a labral tear exists. (Petitioner's Exhibit 2).

Of note, the Petitioner completed a General Intake Form at the initial visit with Dr. Nho on February 27, 2012 in which she indicated that this is a work related injury. (Petitioner's Exhibit 2). Additionally, a Hip Survey was completed on that date in which Petitioner provided the history of the injury from January 26, 2012 and indicated that there was no prior history. Moreover, the Petitioner rated the function of her hip prior to the injury as a 10 (normal). (Petitioner's Exhibit 2). The MR arthrogram was performed on March 28, 2012 and Petitioner returned to Dr. Nho on April 16, 2012. (Petitioner's Exhibit 2). Dr. Nho recommended an injection which was performed on June 4, 2012. (Petitioner's Exhibit 2). Thereafter, Dr. Nho recommended physical therapy which Petitioner underwent at Athletico, the same facility where she was treated for her left knee injury several years earlier. (Petitioner's Exhibits 2 and 4). Dr. Nho further stated that Petitioner has a symptomatic hip labral tear with an underlying diagnosis of

femoroacetabular impingement, which was exacerbated by her work injury on January 26, 2012. (Petitioner's Exhibit 2).

After the IME performed by Dr. Walsh, the Petitioner was forced to seek medical treatment with Dr. Dirk Nelson who concurred with Dr. Nho but referred the Petitioner to Dr. Domb, who was a hip specialist. (Petitioner's Exhibit 5). On March 18, 2013, Dr. Domb evaluated the Petitioner and noted the history of the injury to the left hip beginning after an incident when she was doing inventory at work in January 2012. (Petitioner's Exhibit 6). Dr. Domb was aware of the prior left knee injury that occurred in 2009 as noted in his records. (Petitioner's Exhibit 6). After examining the Petitioner, it appears that Dr. Domb reviewed the MR arthrogram film from March 28, 2012 and noted that it shows an anterosuperior labral tear that was not read by the radiologist. (Petitioner's Exhibit 6). Dr. Domb concurred with Dr. Nho that arthroscopy was appropriate, but requested a new MR arthrogram of better quality. (Petitioner's Exhibit 6). On April 1, 2013 an MR arthrogram of the left hip was performed which revealed an anterior labral tear. (Petitioner's Exhibit 6). On April 2, 2013, Dr. Domb confirmed the tear and stated that the tear was caused by the injury. (Petitioner's Exhibit 6). He further noted the slight acetabular retroversion and stated that it was not caused by the injury

nor was it in and of itself the cause of her hip problem. (Petitioner's Exhibit 6). On April 25, 2013, Dr. Domb met with the Petitioner and recommended arthroscopic repair. (Petitioner's Exhibit 6).

In contrast, the Respondent's well-known IME physician, Dr. Kevin Walsh, opined that any complaints the Petitioner has with regard to her left hip are related to her pre-existing femoral acetabular impingement and not the incident of January 26, 2012. (Respondent's Exhibit 1). It appears that this opinion is based mostly on the mistaken belief that the Petitioner had left hip symptoms that waxed and waned from the time of her left knee surgery. (Respondent's Exhibit 1). However, it is clear that Dr. Walsh did not review the medical records from Dr. Brian Cole or Athletico from 2009 and 2010 relating to her left knee injury or he would have noted the complete absence of any left hip complaints throughout that period. Further, Dr. Walsh did not ask the Petitioner about her complaints of left hip pain prior to January 26, 2012. Instead, Dr. Walsh merely relied on the July 17, 2012 physical therapy note from Athletico in which the therapist noted that the Petitioner feels that her current left hip injury is due to lingering problems stemming from her left knee surgery and that her left hip was thrown out during therapy. Although the therapist's statements immediately thereafter clearly detail the incident of January 26, 2012 and

the injury to the left hip following therefrom, Dr. Walsh ignores these facts. Had Dr. Walsh asked the Petitioner about the statement that appeared in the physical therapy note relating to her left knee injury, he would have known that this was not accurate. Moreover, given the date of the IME report (October 4, 2012), Dr. Walsh did not review any of the medical records subsequent thereto, including the medical records of Dr. Nelson, Dr. Domb and the second MR arthrogram performed on April 1, 2013. (Respondent's Exhibit 1).

Additionally, it appears Dr. Walsh did not even consider whether the incident of January 26, 2012 exacerbated the underlying condition. Rather he simply opines that the underlying condition is responsible for all of Petitioner's left hip problems, despite the contemporaneous complaints of pain immediately following the January 26, 2012 work accident. (Respondent's Exhibit 1).

Thus, it appears that the only basis for Dr. Walsh's opinion about the causal relationship of the left hip condition and the accident is the erroneous belief that Petitioner had left hip symptoms that waxed and waned since her left knee injury several years prior. Since a review of the medical records of Dr. Cole and Athletico reveals no such history, Dr. Walsh's opinion is of little value and is neither persuasive nor credible.

The Arbitrator thus places greater weight upon the findings and opinions of the Petitioner's treating physicians, Dr. Nho and Dr. Domb, whose opinions are credible and persuasive.

Dr. Nho has been the Petitioner's treating orthopedic surgeon since the outset of her injury beginning in February 2012 and has continuously examined and treated the Petitioner since that time. Thus, he is in the best position to formulate an opinion as to the injury and causation. In addition, Dr. Domb, a hip specialist, considered all the issues and after a repeat MR arthrogram confirmed the diagnosis of a labral tear and an underlying impingement, he provided a well reasoned opinion as to the diagnosis and causation.

It is well settled that where an injury is a contributing factor, compensation will be allowed even if it is possible that the Petitioner's condition of ill-being resulted from other contributing factors or degenerative processes. (See International Vermiculite Company v. Illinois Industrial Commission, 76 Ill2d 1, 31 Ill. Dec. 789, 394 N.E.2d 1166 (1979)). Furthermore, in deciding between varying medical opinions, it is for the Commission to decide which medical view is to be accepted and it may attach greater weight to the opinion of the treating physician. International Vermiculite Company, 76 Ill2d at 3.

Accordingly, based upon the Petitioner's testimony and the opinions of Dr. Nho and Dr. Domb, the Arbitrator finds that the Petitioner's current condition of ill-being as to her left hip is causally related to the injury sustained on January 26, 2012.

As to the issue of whether the medical services that were provided to Petitioner were reasonable and necessary and the issue of whether Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary and the Respondent has not paid all appropriate charges for all reasonable and necessary medical services and in support thereof the Arbitrator adopts Petitioner's Exhibits 1 and 2 and 4 through 12 and further finds as follows:

It should be noted that the Respondent's IME physician, Dr. Walsh, after reviewing the medical records and examining the Petitioner, agreed that treatment to date has been reasonable. (Respondent's Exhibit 1). Furthermore, Dr. Nho, Petitioner's initial treating physician, focused on conservative treatment for the left hip injury. (Petitioner's Exhibit 2). After the IME was performed, the Petitioner was treated conservatively by Dr. Nelson and then Dr. Domb. (Petitioner's Exhibits 5 and 6). Dr. Nho, Dr.

Nelson and Dr. Domb all recommend arthroscopic surgery at this point and Dr. Walsh even agrees that given the long course of conservative treatment, the Petitioner can consider surgical intervention. (Petitioner's Exhibits 2, 5 and 6 and Respondent's Exhibit 1).

Therefore, the Arbitrator finds that the treatment rendered to the Petitioner was reasonable and necessary. The Respondent makes no claim of payment for the bills offered into evidence by Petitioner, except for those for which they are entitled to an 8(j) credit. Thus, the Respondent shall pay the medical bills from Midwest Orthopaedic Associates (Petitioner's Exhibit 7), Streeterville Open MRI, LLC (Petitioner's Exhibit 8), Athletico (Petitioner's Exhibit 9), Midland Orthopedic Associates (Petitioner's Exhibit 10), Dr. Benjamin Domb (Petitioner's Exhibit 11) and Radiology and Nuclear Consultants (Petitioner's Exhibit 12).

As to the issue of whether the Petitioner is entitled to any prospective medical care, the Arbitrator finds that the Petitioner is entitled to prospective medical care for her left hip as recommended by Dr. Nho, Dr. Nelson and Dr. Domb and supported by Respondent's IME physician, Dr. Walsh, and in support thereof the Arbitrator adopts Petitioner's Exhibit 2

and Exhibits 4 through 6 and Respondent's Exhibit 1, and further finds as follows:

The Petitioner testified that she has continued complaints of pain and discomfort in her left hip. Petitioner has been under the care of Dr. Nho consistently since February 2012 and then began seeing Dr. Nelson and Dr. Domb thereafter. She has undergone extensive conservative care that has not alleviated her symptoms and all of her physicians as well as the Respondent's IME physician agree that surgical intervention is appropriate. Since the Arbitrator found that the left hip injury is causally related to the accident, the Arbitrator finds that the opinions and recommendations as to future medical treatment proffered by Petitioner's treating orthopedic surgeons are credible and persuasive as they are based upon consistent treatment and examinations of the Petitioner. Accordingly, the Arbitrator finds that Petitioner is entitled to prospective medical care as outlined by her treating physicians.

As to the issue of whether penalties or fees should be imposed upon the Respondent, the Arbitrator finds that Petitioner failed to prove she is entitled to such penalties and fees. The Arbitrator finds that there was a reasonable dispute as to causal relationship in this matter and therefore

denies penalties and fees under sections 19(k), 19(l) and section 16 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Jose Cuevas,

Petitioner,

14IWCC0127

vs.

NO: 11 WC 37441

Imperial Marble Company,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal conneaction, temporary total disability, medical expenses and prospective medical care, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 23, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

14IWCC0127

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 2 0 2014

Michael J. Brennan

Kevin W. Lamborn

Thomas J. Tyrrell

MJB:bjg
0-2/10/2014
52

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0127

CUEVAS, JOSE
Employee/Petitioner

Case# **11WC037441**

IMPERIAL MARBLE CORPORATION
Employer/Respondent

On 4/23/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2044 ALVARO COOK LTD
149 S LINCOLNWAY
SUITE 200
NORTH AURORA, IL 60542

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
JEFFREY T RUSIN
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

14IWCC0127

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JOSE CUEVAS
Employee/Petitioner

v.

IMPERIAL MARBLE CORPORATION
Employer/Respondent

Case # 11 WC 037441

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Falcioni**, Arbitrator of the Commission, in the city of **Geneva**, on **April 10, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☒ TPD ☐ Maintenance ☒ TTD
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On the date of accident, **08/29/11**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$29,388.17**; the average weekly wage was **$565.16**.

On the date of accident, Petitioner was **38** years of age, ***married*** with **2** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$19,531.33** for TTD, **$2,027.16** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$21,558.49**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Temporary Partial Disability

Respondent shall pay Petitioner temporary partial disability benefits of $81.58/week for 21-5/7 weeks, commencing May 4, 2012 through August 11, 2012, as provided in Section 8(a) of the Act.

Respondent shall be given a credit of $2,027.16 for temporary partial disability benefits that have been paid.

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $376.77/week for 59 2/7 weeks, commencing August 30, 2011 through May 3, 2012 and August 12, 2012 through December 19, 2012 and December 21, 2012 through January 27, 2013, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $19,531.33 for temporary total disability benefits that have been paid.

Medical benefits

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, that remain unpaid toValley West Community Hospital, Aurora Radiology Consultants – DeKalb, Nandra Family Practice, DuPage Medical Group and Rush-Copley Medical Center, as listed on the addendum to request for hearing pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $0 for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Prospective Medical

The respondent shall authorize and pay for medical services associated with arthroscopic surgery of the right shoulder recommended by Dr. Asselmeier .

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Robert E Dorn — April 19, 2013

Signature of Arbitrator — Date

ICArbDec19(b)

APR 23 2013

MEMORANDUM OF DECISION OF ARBITRATOR

Petitioner testified at hearing that he was injured on August 29, 2011, in the course of his employment while lifting a large double bowl sink onto his right shoulder. He was in the process of lifting the sink when he lost balance and was jerked backward by the weight of the sink causing him to twist his upper back, neck and right shoulder. Mr. Cuevas testified that he heard a crack in his cervical spine and shoulder and felt immediate pain which he reported to his supervisor. He received treatment on August 30, 2011, at Valley West Community Hospital where he underwent x-rays of his cervical and thoracic spine, was prescribed medication and taken off of work. He was provided with an off work note from Valley West Community Hospital which he tendered to his supervisor (PEX #2).

The petitioner testified that the pain in his upper back, neck and right shoulder continued and he sought treatment from Dr. Nandra of Nandra Family Practice on September 1, 2011. Dr. Nandra attended the petitioner on several occasions for neck and back pain. He recommended physical therapy, medication and MRIs of the cervical and thoracic spine which were performed at Valley West Community Hospital on September 7, 2011. The petitioner was referred to physical therapy at Advanced Physical Medicine of Yorkville with Dr. Berkey. Dr. Nandra continued Mr. Cuevas' off work status and provided him with notes which the petitioner tendered to his supervisor.

The petitioner continued physical therapy and sought treatment from Dr. Matthew Ross of Midwest Neurosurgery and Spine Specialists beginning on October 28, 2011. Dr. Ross recommended additional physical therapy, medication and continued Mr. Cuevas' disability status. The petitioner provided his employer with off work slips and was paid temporary total disability benefits by the respondent. On November 18, 2011, Dr. Ross recommended an EMG/NCV of the right arm and referred the petitioner to Dr. Asselmeier an orthopedic surgeon for evaluation of his right shoulder (PEX #5).

On November 23, 2011, at the request of the respondent's insurance carrier, the petitioner underwent an IME performed by Dr. Shaun T. O'Leary. Dr. O'Leary also recommended an EMG of the right upper extremity, a CT of the cervical spine, an epidural steroid injection for his arm pain and continued physical therapy (PEX #9).

On December 15, 2011, Dr. Ross reiterated his recommendation for an EMG/NCV as well as an orthopedic evaluation for shoulder complaints. Dr. Ross continued to place the petitioner in an off work status (PEX #5).

Petitioner underwent an EMG/NCV on December 16, 2011. He was examined by Dr. Asselmeier of DuPage Medical Group on January 4, 2012. Dr. Asselmeier recommended an MRI of the right shoulder and continued the petitioner's off work status. The petitioner underwent an MRI of the right shoulder on January 24, 2012, and continued to treat with Dr. Asselmeier who recommended physical therapy and performed a subrocomial injection on March 7, 2012. He also continued the petitioner's off work status. On April 4, 2012, Dr. Asselmeier diagnosed rotator cuff syndrome, acromioclavicular arthropathy, and myofascial pain syndrome. Dr. Asselmeier's note discussed the petitioner's options as: return to work on light duty or proceed with arthroscopic surgery of the right shoulder (PEX #6).

The petitioner returned to light duty work on May 4, 2012. He testified that T.T.D. had been paid up to that point. He continued to work on light duty status through August 11, 2012, when no further light duty was available (PEX #16). He testified that he was paid T.P.D. during the time he was working light duty. The petitioner was examined by Dr. Asselmeier in May and June of 2012, at which time Dr. Asselmeier reiterated his recommendation for arthroscopic surgery of the right shoulder (PEX #6).

On August 14, 2012, at the respondent's request, the petitioner submitted to an examination with Dr. Mark N. Levin. Dr. Levin recommended an arthrogram MRI of the right shoulder. Dr. Asselmeier, the treating physician, stated in his treatment note of September 12, 2012, that the arthrogram was unnecessary because he did not believe the petitioner's condition involved a labral tear. Dr. Asselmeier continued to recommend the 10 pound lifting restriction and surgical intervention. Despite Dr. Asselmeier's recommendation against the arthrogram, the petitioner followed the IME doctor's recommendation and underwent the arthrogram on October 1, 2012. Dr. Asselmeier examined the petitioner after the arthrogram on October 10, 2012, and noted that there was no superior labral abnormality. He renewed his recommendation for acromioplasty and distal clavicle resection and recommended that the petitioner remain off work until surgery was approved (PEX #6). On November 1, 2012, the arthrogram was reviewed by Dr. Levin who indicated that he found no evidence that required additional orthopedic intervention and recommended that the petitioner return to work full duty (PEX #3).

The petitioner testified that he became aware of Dr. Levin's recommendation mid December of 2012, and presented for regular duty work on December 20, 2012. He testified that he was required to work with a pressurized spray gun attached to a hose. The petitioner testified that he is right hand dominant and that the he was offered required that he have his right arm extended and move his arm back and forth repeatedly while holding the spray gun throughout an eight hour day. He testified that his right shoulder

and neck symptoms increased and that he reported it to his supervisor, who instructed him to go home.

The petitioner then applied for vacation time pay for several weeks until he was again able to return to work without restriction on January 28, 2013. The petitioner testified that his vacation pay as well as his current rate of pay since returning to work was $8.25 per hour which is less than the $13.24 per hour that he was earning at the time of his injury. The petitioner further testified that he was not lifting heavy sinks or using the heavy spray gun since his return to work in January of 2013. He testified that at the time of hearing he continued to experience pain in his shoulder and neck which affected him on a daily basis and required that he take Tylenol three times a day. He testified that his pain had improved very slightly since the date of accident and it affected him in his work activities as well as in his normal daily activities. He testified that he had never injured his neck, upper back or right shoulder prior to or since the accident.

ISSUES PRESENTED

CAUSAL CONNECTION:

The history of the mechanism of injury and the injury itself alleged by the petitioner was consistently documented in the medical records. A minor exception is found in the records of Valley West Community Hospital in the treatment note of August 30, 2011, which states "the patient is a 38 year old male who was at work yesterday lifting furniture" (PEX #2). That treatment note stated that he lifted above his head turned toward the right and felt pain between his shoulder blades mainly in the thoracic and cervical area.

Dr. Nandra's note of September 1, 2011, states the symptoms began following a specific injury involving the upper back and mid back. Dr. Nandra's note of October 10, 2011, states the visit is for follow-up of right scapular area and that the patient complained of back pain (scapular area). His note of October 19, 2011, indicates neck pain injury happened two months ago activity involved lifting and the activity was performed at work (PEX#3). The September 15, 2011, note of Dr. Berkey at Advanced Physical Medicine of Yorkville states that the petitioner presented for neck pain and bilateral upper extremity pain with the right being worse than the left. The treatment note outlines an injury which occurred while lifting a sink on August 29, 2011 (PEX #4).

The treatment note of Dr. Ross of October 28, 2011, states that on August 29, 2011, the petitioner was lifting a sink onto his shoulder when it hit something causing him to twist at which point he experienced a crack in the back of his neck and pain which tracked into his arms (PEX #5).

The November 23, 2011, IME report of Dr. O'Leary documented an injury at work while lifting a sink in August of 2011, which caused neck and pain radiating into the right arm (PEX #9). The IME report of Dr. Levin dated August 14, 2012, documented an injury that occurred at work on August 29, 2011, when the petitioner picked up a double bowl marble sink that weighed about 140 pounds to his right shoulder. Dr. Levin documented that the sink hit the angled ceiling and jarred his right shoulder where he heard a pop (REX #2).

The petitioner's symptoms have also been consistent since the date of injury. Valley West Community Hospital documented pain between the shoulder blades mainly to the thoracic and cervical area (PEX #2). Dr. Nandra documented neck, upper back, mid back and right scapular pain (PEX #3). Dr. Berkey documented neck pain, weakness and pain in the arms and diagnosed cervical/brachial syndrome and noted tenderness of the cervical spine, thoracic spine, suboccipital muscle and trapezius muscle (PEX #4).

On October 28, 2011, Dr. Ross documented tenderness over the paravertebral muscles and right trapezius give-way weakness in the right arm. On November 18, 2011, Dr. Ross documented that the petitioner's right shoulder had limited mobility with flexion, abduction and internal rotation along with tenderness to palpation over the right trapezius muscle as well as over the posterior shoulder capsule. His note states "it is becoming increasing apparent that a component of Mr. Cuevas' pain is originating from the right shoulder itself" (PEX #5).

The MRI report of Salt Creek Medical Imaging of Hinsdale documented A.C. joint degenerative change and rotator cuff tendinosis with bursal surface fraying of the supraspinatus tendon (PEX #6).

Dr. Asselmeier in the first visit of January 4, 2012, documented some scapular maltracking, mild discomfort with neck movement and limited recreation of anterior shoulder symptomatology with movement. His impression/diagnosis was rotator cuff syndrome, possible rotator cuff tear. On February 8, 2012, Dr. Asselmeier documented a bit of crepitus, a mild abduction arc and some pain with flexion and internal rotation. His diagnosis was trapezial myofascial strain, possible radiculitis, probable rotator cuff syndrome, right shoulder. His March 7, 2012, note documented subacromial crepitus, positive abduction arc, some trouble with internal rotation. His diagnosis remained probable rotator cuff syndrome. By April 4, 2012, the diagnosis was rotator cuff syndrome, acromioclavicular arthropathy, myofascial

pain syndrome. Having failed conservative care Dr. Asselmeier recommended arthroscopic acromioplasty and distal clavicle resection of the right shoulder on April 4, 2012 (PEX #6).

The only evidence offered by the respondent concerning causal connection and the necessity of surgery were two reports prepared by Dr. Levin of Barrington Orthopedics. The report of August 14, 2012, documents a physical examination which proved to be painful for the right arm with abduction up to 170 degrees and limitation of external rotation to 60 degrees on the right versus 90 degrees on the left as well as shoulder pain on the right with abduction and external rotation. Dr. Levin discussed the MRI findings of the cervical spine noting the bulging discs at C2, C3, C4 and C5-C6 with no disc herniation and nerve impingement. He reviewed the MRI of the thoracic spine which he found unremarkable. Dr. Levin did not specifically mention the MRI of the right shoulder performed on January 24, 2012, however he appears to allude to it in stating that the rotator cuff is intact but that there was slight AC joint hypertrophy. He did not mention the findings of the MRI concerning rotator cuff tendinosis with bursal surface fraying of the supraspinatus tendon. Dr. Levin's conclusion was that there was insufficient objective evidence of pathology of the right shoulder to warrant surgical intervention and recommended an arthrogram MRI. Petitioner testified that Dr. Levin's examination lasted three to four minutes.

Dr. Asselmeier's treatment note of September 12, 2012, documents his opinion that an MRI arthrogram was excessive and unnecessary due to the fact that the patient had already undergone a noncontrast MRI. Dr. Asselmeier indicated that the arthrogram was not likely to reveal a labral tear as a source of the petitioner's pathology (PEX #6, 09/12/12). Nevertheless, the petitioner underwent the MRI arthrogram going so far as to have the prescription for that test made out by Dr. Ross (PEX #5, 09/.18/12).

Dr. Levin's IME report of November 28, 2012, involved the review of the arthrogram MRI. Dr. Levin stated that the study was relatively normal and did not recommend any additional orthopedic interventions and recommended that the petitioner return to work full duty. It is clear from the report as well as the petitioner's testimony that Dr. Levin did not reexamine the petitioner and that his sole examination was conducted on August 14, 2012.

Dr. Asselmeier did examine the petitioner after the arthrogram on October 10, 2012. He reviewed the arthrogram which confirmed that there was no labral abnormality. At that time Dr. Asselmeier stated in the treatment plan section of his note as follows; "I have again related to Jose the complexity of his case. Unfortunately, he has had no improvement in functionality. He continues to aspire to get back and work. I think his only chance of doing this would be to proceed with arthroscopy of his right shoulder. I have offered arthroscopic

acromioplasty and distal clavicle resection in the future. He is working on workers' compensation approval. He will remain off work in the interm" (PEX #6).

Dr. Asselmeier also examined the petitioner on January 9, 2013, his treatment plan stated as follows; "Jose has certainly failed fairly exhaustive attempts at conservative care. His clinical presentation is complex and his exam is to a degree confusing and inconsistent, but he certainly has a fairly profound disability in his shoulder at this point and I think the only chance that we have of getting him back to a reasonable functional level or at least a reasonable pain level would be to consider arthroscopic surgery of his shoulder. I have offered arthroscopic acromioplasty and distal clavicle resection". (PEX #6)

Dr. Asselmeier's narrative report dated January 18, 2013, stated that the petitioner has an element of chronic impingement with acromioclavicular arthropathy of the right shoulder which is complicated by chronic trapezial myofascial syndrome with possible cervical radiculitis. He stated that Mr. Cuevas' current condition was caused and/or aggravated by the accident of August 29, 2011.

The arbitrator finds that the petitioner's mechanism of injury has been consistently documented as have his persistent symptoms. At the time of trial his symptoms had not improved and he experienced continual difficulty with the use of his right arm and pain in his cervical spine and upper back. The petitioner cooperated with treatment and exhausted all conservative measures in seeking a cure of his condition including undergoing an MR arthrogram not recommended by his treating doctor. The respondent offered no evidence of alternate causation or intervening accident. Dr. Levin's report seems to focus on the petitioner's subjective complaints and negative finding of rotator cuff tear and seems to imply that subjective complaints are not valid physical findings. Furthermore, Dr. Asselmeier's diagnosis is not that of a rotator cuff tear but impingement with acromoclavicular arthropathy. Based on the record as a whole, the Arbitrator finds Dr. Asselmeier to be more credible and finds that the petitioner's current condition of ill being is causally connected to the accident of August 29, 2011.

TEMPORARY TOTAL DISABILITY AND TEMPORARY PARTIAL DISABILITY:

The petitioner was treated at Valley West Community Hospital where he was instructed to remain off of work until cleared by his physician (PEX #2). The petitioner testified that he was provided with an off work slip which he tendered to his supervisor. The petitioner was then treated by Dr. Nandra who placed the petitioner in an off work status from the first visit of September 1,

2011 through the last visit of October 19, 2011, until he was cleared by a neurosurgeon (PEX #3). The petitioner was then treated by Dr. Ross of Midwest Neurosurgery who continued his disability status as of October 28, 2011 through January 12, 2012, when he referred the petitioner to Dr. Asselmeier for orthopedic evaluation of his right shoulder (PEX #5).

The petitioner was treated by Dr. Asselmeier on January 4, 2012, at which time his disability status was continued until Dr. Asselmeier recommended a return to work on light duty basis as of April 4 and 11th of 2012 (PEX #6). The respondent provided the petitioner with light duty work May 4, 2012, which continued through August 11, 2012. The petitioner testified that during the time he was working light duty he received temporary partial disability benefits from the workers' compensation insurance carrier. The petitioner testified that there was no light duty work available for him after August 11, 2012. His testimony is corroborated by a letter from the respondent dated August 15, 2012 (PEX #16).

The petitioner was examined by Dr. Levin on August 14, 2012. Dr. Levin's IME report of that date states that if the petitioner did not elect to undergo the arthrogram MRI he would be at MMI and could return to work full duty. Dr. Levin did not state what the petitioner's work status would be if he were to undergo the arthrogram. The petitioner underwent the arthrogram on October 1, 2012. Dr. Levin prepared a second report on November 28, 2012, releasing the petitioner to regular duty work which was sent to petitioner's attorney by respondent's attorney. However the petitioner's attorney did not receive said letter until December 17, 2012, consequently the petitioner was not informed of Dr. Levin's recommendation until mid December, 2012 (PEX #10).

The petitioner testified that he attempted to return to work on December 20, 2012, despite the fact that his treating doctor had recommended surgery and placed him in an off work status (PEX #6, 10/10/12). He testified that he was required to use a heavy pressure spray gun attached to a hose with his arm extended moving the gun back and forth from side to side throughout the work day. The petitioner testified that he experienced an increase of pain in his right shoulder, upper back and neck in performing those duties and was unable to complete the work day. The petitioner informed his employer of his condition and was sent home. The petitioner then applied for vacation benefits which were paid at $8.25 an hour instead of his hourly rate of $13.24 per hour (PEX #11).

After he had exhausted his vacation pay the petitioner returned to regular work on January 28, 2013, and continued to work for the respondent as of the date of hearing. Petitioner testified that he was currently being paid $8.25 an hour instead of his hourly rate of $13.24 an hour. His testimony was corroborated by check stubs dated February 8 through April 5, 2013 (PEX #12).

The majority of the petitioner's temporary total disability and temporary partial disability were paid. The arbitrator finds that the remainder of T.T.D. claimed by Petitioner should be paid given the fact that the petitioner attempted to return to regular work but was unable to perform the duties assigned to him due to his symptoms. The petitioner acted in good faith in doing so despite the recommendations of his treating physician that he remain off of work. He should not have had to rely on vacation benefits when his treating doctor had placed him in an off work status and no light duty work was available.

The arbitrator finds that T.T.D. periods should be paid from August 30, 2011 through May 3, 2012, August 12, 2012 through December 19, 2012 and December 21, 2012 through January 27, 2013 for a total of $22,337.25 in T.T.D. benefits. Respondent paid a total of $19,531.33 which should be subtracted from the total T.T.D. award.

Additionally the respondent offered no reason for underpayment of the petitioner's current wages. However the Petiitoner testified that he was back working full duty for Respondent, albeit with substantial pain. What the respondent chooses to pay workers who are working full duty is not a matter that the Commission can concern itself with, therefore Petitioner's request for TPD during the period January 27, 2013 through the date of hearing is denied.

MEDICAL EXPENSES:

The petitioner claims unpaid medical bills as stated on the addendum to the request for hearing from Valley West Community Hospital, Aurora Radiology Consultants, Nandra Family Practice, DuPage Medical Group and Rush-Copley Medical Center. The treatment at Valley West Community Hospital August 30, 2011, per petitioner's exhibit number 2 clearly relates to a lifting incident at work on August 29, 2011. The dates of treatment listed on the addendum with Nandra Family Practice all relate to injury of the neck, upper back and right shoulder per PEX #3.

The bill with a balance due of $152.00 from DuPage Medical Group relates to treatment with Dr. Marc Asselmeier the petitioner's orthopedic surgeon. All of said treatment clearly relates to an injury sustained in the course of employment on August 29, 2011 per PEX #6. Dr. Asselmeier's narrative report states that treatment he had rendered as well as testing conducted is related to the accident of August 29, 2011 (PEX #8).

The treatment at Rush-Copley Medical Center on October 1, 2012, for an arthrogram MRI of the right shoulder is clearly related to the petitioner's injury and was in fact recommended by Dr. Levin, the respondent's IME physician.

The arbitrator finds that the treatment was reasonable and necessary and related to the petitioner's accident of August 29, 2011, and orders the respondent to pay the outstanding bills pursuant to the fee schedule. Respondent to receive credit for al sums previously paid hereunder.

PENALTIES AND ATTORNEY'S FEES:

The Arbitrator declines to award penalties and attorney fees as requested by Petitioner herein and finds that Respondent did not act vexatiously or unreasonably.

PROSPECTIVE MEDICAL:

The petitioner has not recovered from injuries sustained on August 29, 2011, in the course of his employment. His symptoms have been consistent since the date of injury.

Per his narrative report, Dr. Asselmeier recommended diagnostic arthroscopy of the right shoulder with treatment of featured pathology, and quite possibly distal clavicle resection. He stated that the basis for his recommendation would be related to the petitioner's ongoing symptom complex, localizing symptoms over his acromioclavicular joint, pain with shoulder level movement, abnormal MRI of the right shoulder and his response to subacromial injection. In relating the course of treatment rendered to Mr. Cuevas, Dr. Asselmeier stated in his narrative report, "an MR arthrogram would not relieve Jose's symptoms. If in deed it was normal or equivocal, the transition would still be towards surgery. It is my feeling that unless further treatment would be rendered, Jose was now a year since his injury and he would quite probably have close to zero possibility of getting him back to his prior level of employment or managing his pain." Dr. Asselmeier concluded that the treatment recommended is related to the accident of August 29, 2011.

Dr. Asselmeier's recommendation for surgery is reasonable given the petitioner's continued symptoms, the findings of the MRI and the fact that Dr. Asselmeier examined the petitioner as recently as January of 2013. Therefore the arbitrator directs the respondent to authorize and pay for the arthroscopic surgery recommended by Dr. Asselmeier as well as any postoperative care if that is indicated.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☒ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert T. Stanley II,

Petitioner,

14IWCC0128

vs.

NO: 99 WC 48947

II-in-One Contractors, Inc,
Illinois State Treasurer as Ex-Officio
Custodian of the Group Self-Insurers
Insolvency Fund, &
Illinois State Treasurer as Ex-Officio
Custodian of the Group Workers'
Compensation Pool Insolvency Fund,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent (Illinois State Treasurer) herein and notice given to all parties, the Commission, after considering the issues of entry of award against the self-insurance insolvency fund, and other insolvency funds and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner was a 21 year old employee of Respondent, II-In-One, in October 1997. Petitioner who, began his employment with Respondent in 1993, described his job as a construction laborer. Respondent was involved in erecting, removing, remodeling, altering and demolishing buildings and other structures; engaged in the construction business. Petitioner, a member of Laborers' Local 149, agreed that Respondent had the

right to control the manner in which he performed his work. Petitioner was a construction worker and Respondent was a contractor. Petitioner testified that Respondent supplied tools, materials, and equipment. Petitioner testified that he earned $22.35 per hour and normally worked a 40-hour work week ($894.00 per week). Petitioner's pay scale was set per a collective bargaining agreement and Respondent withheld taxes from his pay. Respondent, per the bargaining agreement, had the right to fire Petitioner if he was not doing an adequate job. Petitioner testified his job duties included pouring concrete, working with carpenters, and cleaning up. Petitioner testified in his job he did a lot of bending, stooping and heavy lifting among other things.

- Petitioner testified that in October 1997 Respondent sent Petitioner to a Metropolitan Water Reclamation District facility around Skokie, Illinois; he had been working at that facility for about two months. Petitioner was 21 years old and unmarried at the time of the assignment (Petitioner married and had first child in 1998). Petitioner testified that they were redesigning the facility's human waste tanks. He stated the tanks were square and the waste was being caught in the corners of the tanks so they were rounding the tanks; pouring more concrete to circularize the tanks (instead of square). Petitioner testified that he was working inside the tanks which were drained but not cleaned so there was still human waste on the walls in the tanks. Petitioner testified that he had worked in that environment for about two months and got sick around October 18, 1997. Petitioner testified that when he became ill his body had turned yellow from head to toe. Petitioner first sought medical treatment at Ottawa Community Hospital on October 18, 1997. Petitioner testified that he notified his supervisor, Dave Lester of the events.

- Petitioner testified he was first hospitalized at Ottawa Community Hospital; however, he was transferred to the University of Illinois (UIC) Medical Center on October 19, 1997. Petitioner was ultimately diagnosed with acute hepatitis/hepatic failure (Hepatitis A - infectious hepatitis) and was treated by Dr. Thomas Layden, the chief of the section of digestive and liver disease at UIC Medical Center. Petitioner was discharged from UIC on October 21, 1997 but remained under the care of Dr. Layden through October 30, 1997. Petitioner was released to return to work as of November 3, 1997. Petitioner viewed PX12 and indicated those were the bills regarding his hospitalization and treatment for his illness; Petitioner testified that he had paid all of the bills out of pocket. Petitioner testified that he had received two payments from a liquidator appointed by the Illinois Department of Insurance. Petitioner stated that aside from those payments he had not been reimbursed for his medical bills from Respondent or any other source. Petitioner testified that he did not have any residual symptoms or complaints from his illness and that he was not claiming any permanent disability in this case.

The Commission finds the evidence is undisputed that Petitioner suffered a work related exposure resulting in his contracting hepatitis A from the human waste which was in the tank in which he worked. There is an undisputed causal connection opinion by Petitioner's treating doctor and there is the history of the exposure in the record. The evidence and testimony clearly

establishes accident, causal connection and consequently, Petitioner's entitlement to benefits which is not in dispute.

The Commission notes that Respondent asserts that the Arbitrator incorrectly determined that the Petitioner had a vested right to obtain payment from a non-existent fund. Respondent argues that the Arbitrator erred when he ordered an Illinois State official to transfer money from an existing state fund to a non-existent one. Respondent stated the Arbitrator ordered the Illinois State Treasurer to transfer funds from the Group Worker's Compensation Pool Insolvency Fund to the non-existent Group Self-Insurers' Insolvency Fund. Respondent argues that the Arbitrator further erred in directing that payment be made from the non-existent Group Self-Insurers' Insolvency Fund. Respondent asserts that the Arbitrator's order exceeded his statutory authority and is directly contrary to controlling law. Respondent argues that the Arbitrator's order directing the State Treasurer to transfer money out of the Group Workers' Compensation Pool Insolvency Fund directly violates §107a.13(c) of the Illinois Insurance Code. Respondent argues that the Arbitrator's reliance on the Appellate Court's decision in Elsbury is misplaced because the Appellate Court's decision was vacated by the Illinois Supreme Court. Furthermore, neither the issue nor the resulting analysis bears any relationship to the instant case. Respondent asserts that if the Commission rules that either the non-existent Insolvency Fund or the Pool Insolvency Fund (or they are one in the same) is responsible for making payment it should simply state so and leave it to the responsible State officials to determine how to make payment consistent with the Commission decision and applicable State law. Accordingly, Respondent argues that the Commission should vacate that portion of the Arbitrator's order requiring the State Treasurer to transfer funds to and make payment from the non-existent Group Insurers' Insolvency Fund.

The Commission finds that the Arbitrator does not have the authority to order the transfer of moneys between the funds and as such the Commission, herein, vacates the Arbitrator's order to transfer funds from the existing fund to the old fund. The Commission finds that the Respondent (now non-existent) Group Self-Insurance Insolvency Fund/Pool Insolvency Fund is clearly responsible to satisfy the award as otherwise found in the Arbitrator's decision and affirms all else. The Commission herein, orders the responsible State of Illinois officials to determine how to make payment of this award consistent with decision and applicable State law.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrators order to transfer funds is hereby vacated, with the remainder of the award, herein, affirmed

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $596.00 per week for a period of 2-1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $13,062.40 for medical expenses under §8(a) of the Act.

14IWCC0128

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: FEB 20 2014
O: 12/12/13
DLG/jsf
45

David L. Gore

Michael P. Latz

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STANLEY, ROBERT
Employee/Petitioner

Case# **99WC048947**

14IWCC0128

II-IN-ONE CONTRACTORS INC ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE GROUP SELF-INSURERS INSOLVENCY FUND & ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE GROUP WORKERS' COMPENSATION POOL INSOLVENCY FUND
Employer/Respondent

On 5/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0274 HORWITZ HORWITZ & ASSOC
MARC A PERPER
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

0522 THOMAS MAMER & HAUGHEY
JOHN M STURMANIS
30 E MAIN ST SUITE 500
CHAMPAIGN, IL 61820

5048 ASSISTANT ATTORNEY GENERAL
MEGAN JANICKI
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Robert Stanley
Employee/Petitioner

v.

Il-in-One Contractors, Inc., Illinois State Treasurer, as Ex-Officio Custodian of the Group Self-Insurers Insolvency Fund, and Illinois State Treasurer, as Ex-Officio Custodian of the Group Workers' Compensation Pool Insolvency Fund,
Employer/Respondent

Case # **99** WC **48947**

14IWCC0128

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **April 19, 2013** . After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES:

A. ☒ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☒ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☒ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☒ What were Petitioner's earnings?
H. ☒ What was Petitioner's age at the time of the accident?
I. ☒ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury? Should penalties or fees be imposed upon Respondent?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other **Occupational Disease**

FINDINGS:

On **October 18, 1997**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner was exposed to an occupational disease that arose out of and in the course of employment.

Timely notice of this exposure was given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the exposure.

In the year preceding the injury, Petitioner earned **$46,488.00**; the average weekly wage was **$894.00**.

On the date of accident, Petitioner was **21** years of age, ***single*** with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ **- 0 -** for TTD, $ **- 0 -** for TPD, $ **- 0 -** for maintenance, and **$6,582.94** for other benefits, for a total credit of **$6,582.94**.

Respondent is entitled to a credit of $ **- 0 -** under Section 8(j) of the Act.

ORDER:

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $596.00/week for 2-1/7 weeks, commencing October 19, 1997 through November 2, 1997, as provided in §8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued.

Medical benefits

Respondent shall pay Petitioner the further sum of $13,062.40 for reimbursement of reasonable and necessary medical expenses, as provided in §8(a) of the Act.

Credit

Respondent shall be given credit for $6,582.94 for benefits paid to Petitioner by the Special Deputy Receiver for Illinois Earthcare Workers' Compensation Trust in Liquidation.

Group Self-Insurers Insolvency Fund and Group Workers' Compensation Pool Insolvency Fund

The Illinois State Treasurer was named as a co-Respondent in this matter, as ex-officio custodian of both the Group Self-Insurers Insolvency Fund established under the former §4a of the Act, 820 ILCS 305/4a (1996) (repealed January 1, 2001 by PA-91-757 §10, effective January 11, 2001), and the Group Workers' Compensation Pool Insolvency Fund established under the Workers' Compensation Pool Law, 215 ILCS 5/107a.01 et seq. The State Treasurer, as ex-officio custodian of both Funds, was represented by the Illinois Attorney General, and this award is hereby entered against the Group Self-Insurers Insolvency Fund and the Group Workers' Compensation Pool Insolvency Fund for the balance of the benefits due and owing the

Petitioner after accounting for Respondent's credit. Payment shall be made to Petitioner by the Group Self-Insurers Insolvency Fund. The Group Workers' Compensation Pool Insolvency Fund, as successor to the Group Self-Insurers Insolvency Fund, shall, if necessary, transfer sufficient funds to the Group Self-Insurers Insolvency Fund to enable it to pay the benefits due and owing the Petitioner.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Milton Black

Signature of Arbitrator

May 15, 2013
Date

MAY 15 2013

STATE OF ILLINOIS)
)
COUNTY OF COOK)

BEFORE THE WORKERS' COMPENSATION COMMISSION OF ILLINOIS

ROBERT STANLEY,)
)
Petitioner,)
)
-*v.*-)
)
II-IN-ONE CONTRACTORS, INC., ILLINOIS STATE TREASURER, as Ex-Officio Custodian of the GROUP SELF-INSURERS INSOLVENCY FUND, and ILLINOIS STATE TREASURER, as Ex-Officio Custodian of the GROUP WORKERS' COMPENSATION POOL INSOLVENCY FUND,)
)
Respondents.)

ATTACHMENT TO DECISION OF ARBITRATOR:
FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT:

Petitioner ROBERT STANLEY II was a 21-year old construction laborer and member of Local 149 of the Laborers Union, employed by Respondent II-IN-ONE CONTRACTORS, INC. on and before October 18, 1997. At that time, he was single with no dependent children.

Petitioner testified without rebuttal that II-in-One was in the business of erecting, maintaining, removing, remodeling, altering and demolishing structures, and was engaged in the business of construction. II-in-One supplied Petitioner's tools, materials and equipment and had the right to control the manner in which he performed his work. II-in-One hired Petitioner pursuant to its collective bargaining agreement with Laborers Local 149, pursuant to which he was paid $22.35 per hour over a forty-hour workweek, for an average weekly wage of $894.00. Taxes were withheld from his pay. Respondent had the right to discharge him, subject to the terms of the union contract.

In late September or early October, 1997, Respondent assigned Mr. Stanley to work at the Metropolitan Water Reclamation District Skokie water filtration plant. His job duties involved rebuilding existing waste tanks at the facility. The tanks had been drained; however, a residue of raw sewage -- including untreated human waste -- remained in the tanks. Petitioner was exposed to this contaminated waste on a daily basis for a period of one to two months.

By October 18, 1997, Petitioner felt ill and noticed that his skin appeared yellow. He was hospitalized at Community Hospital of Ottawa on October 18, 1997 with symptoms of nausea and vomiting. Examination of the abdomen revealed right upper quadrant tenderness. Lab work demonstrated markedly elevated liver enzymes anywhere from 400 to 500 times normal. He was diagnosed with acute hepatitis and was transferred to University of Illinois Medical Center in Chicago (PX 2). Petitioner notified his supervisor, Dave Lester, of his illness.

Petitioner was admitted to UIC Medical Center from October 19 through 21, 1997 under the care of Dr. Thomas J. Layden, Chief of the Section of Digestive and Liver Diseases at UIC. Petitioner gave a history of being "involved in sewer work" for three weeks prior to admission. While hospitalized, his condition gradually improved. Mr. Stanley was discharged home on October 21, 1997 with a diagnosis of acute hepatitis A virus. He was instructed to follow up with the gastrointestinal clinic on October 30, 1997 and to remain off work in the interim (PX 3).

On October 22, 1997, Dr. Layden wrote Oliver Pfiefer at II-in-One Contractors, stating that Petitioner's acute hepatitis A virus was a "work-related illness especially from his working in the sewer weeks prior to the onset of jaundice" (PX 3; PX 4).

Petitioner remained under Dr. Layden's care. By October 30, 1997, only mild tenderness about the liver was present. Dr. Layden diagnosed "recovered HAV" and released Petitioner to return to work effective Monday, November 3, 1997 (PX 4).

At the present time, Petitioner experiences no residual symptoms of his acute hepatitis A virus and alleges no permanent disability as a result of the illness.

The following medical bills were admitted in evidence:

Provider	Amount
Dr. Arturo Tomas	$165.50
Superior Air-Ground Ambulance	1,789.37

Ottawa Medical Center	233.17
Community Hospital of Ottawa	4,023.38
Associated Gastroenterology	173.00
UIC Medical Center	4,940.98
Dr. Harney	450.00
Dr. Swamy	146.00
I.M.A. Dept of Medicine	1,110.00
Univ of IL Radiology	31.00
Totals	$13,062.40

(PX Group 12). Petitioner testified that he paid the above bills out of pocket, in their entirety.

At the time of the occurrence, II-in-One was a member of a risk pool styled, "Illinois Earth Care Workers' Compensation Trust" (hereinafter, "Earth Care") for the purpose of pooling its liabilities under the Act with other employers (see PX 9; PX 10; PX 11). On October 26, 2000, by order of the Circuit Court of Cook County, Illinois, Hon. Julia M. Nowicki, Judge Presiding, Earth Care was declared insolvent, with all its assets transferred to the Director of the Department of Insurance as Liquidator (PX 5). The order provided that "all … persons and entities having knowledge of this order" are "restrained from bringing or further prosecuting any claim … against EARTH CARE, or its property or assets, or the Director or Liquidator" (PX 5).

The Director of the Department of Insurance, as Liquidator, appointed a Special Deputy Receiver who made two distributions to Petitioner totaling $6,582.94 out of the confiscated Earth Care assets (PX 10; PX 11). Petitioner testified that neither his employer nor its representatives has made any payments towards his lost time or reimbursement of his medical expenses, aside from the $6,582.94 he received from the Special Deputy Receiver.

Petitioner's Second Amended Application for Adjustment of Claim names as Respondents II-in-One Contractors, Inc., along with the State Treasurer as Ex-Officio Custodian of two special funds; i.e., the Group Self-Insurers Insolvency Fund, and the Group Workers' Compensation Pool Insolvency Fund.

CONCLUSIONS OF LAW:

With reference to (A) and (O) (Was Respondent operating under and subject to the Illinois Workers' Occupational Diseases Act), the Arbitrator finds as follows:

Three parties Respondent have been named. With reference to II-in-One Contractors, Inc., the Arbitrator finds that II-in-One was an extra-hazardous business or enterprise covered automatically and without election by the provisions of the Workers' Compensation Act, in that II-in-One was engaged in the erection, maintaining, removing, remodeling, altering or demolishing structures, as defined by §3.1 of said Act, 820 ILCS 305/3.1, and was engaged in construction work, as defined by §3.2 of said Act, 820 ILCS 305/3.2. This determination is based upon the unrebutted testimony of the Petitioner.

The Arbitrator further notes that under §2(a) of the Workers' Occupational Disease Act, an employer who is covered automatically and without election by the Workers' Compensation Act pursuant to §3 is, by operation of law, also covered automatically and without election by the provisions of the Workers' Occupational Disease Act, provided the date of last exposure to the hazards of the disease occurred on or after July 1, 1957. See 820 ILCS 310/2(a).

Accordingly, the Arbitrator finds that Respondent II-in-One Contractors, Inc. was operating under and subject to the Workers' Occupational Diseases Act at all times relevant to this claim.

With reference to the obligations of the State Treasurer as Ex-Officio Custodian of the Group Self-Insurers Insolvency Fund and/or the Group Workers' Compensation Pool Insolvency Fund, the Arbitrator notes that a worker's rights under the Workers' Compensation and Occupational Diseases Acts are governed by the law in effect at the time of the injury or disease. See e.g., Wilson-Raymond Constructors Co. v. Industrial Comm'n, 79 Ill.2d 45, 51, 402 N.E.2d 584 (1980). In the instant case, Petitioner's disablement and last exposure to the hazards of the occupational disease occurred on October 18, 1997; therefore his rights are governed by the version of the Act in effect on that date. Id.

On and before October 18, 1997, §4a(5) of the Workers' Occupational Diseases Act provided, in pertinent part, as follows:

> Except as hereinafter provided, on January 1, 1984, and July 1, 1984, and on January 1 and July 1 of each year thereafter, all group self-insurers shall pay a sum equal to .5% of all compensation payments made under either the Workers' Compensation Act or the Workers' Occupational Diseases Act during the 6 months immediately preceding the date of payment, into a Fund to be known as the "Group Self-Insurers' Insolvency Fund."
>
> The State Treasurer is ex-officio custodian of the Group Self-Insurers' Insolvency Fund. Monies in the Fund shall be deposited the same as are State funds and any interest accruing on moneys in the Fund shall be added to the Fund every 6 months It shall be subject to audit the same as State funds and accounts and shall be protected by the general bond given by the State Treasurer. It is considered always appropriated for the purposes of compensating employees who are eligible to receive benefits from their employers pursuant to the provisions of the Workers' Compensation Act or Workers' Occupational Diseases Act, when their employer is the member of a group self-insurer and the group self-insurer has been unable to pay compensation due to financial insolvency either prior to or following the date of the award. Monies in the Fund may be used to compensate any type of injury or occupational disease which is compensable under either Act.
>
> The State Treasurer shall be joined with the group self-insurer as party respondent in any claim, or application for adjustment of claim filed against a group self-insurer whenever the compensation and medical services provided by this Act may be unpaid by reason of default of an insolvent group self-insurer.
>
> Payment shall be made out of the Group Self-Insurers' Insolvency Fund only upon order of the Commission and only after the penal sum of the surety bond and/or securities and the assessment against the individual members of the group self-insurer in default have been exhausted.

820 ILCS 310/4a(5) (1996).

On January 1, 2001, the General Assembly repealed §4a of the Act and, through Public Act 91-757, enacted the "Workers' Compensation Pool Law" (hereinafter, the "Pool Law"), 215 ILCS 5/107a.01 et seq. Pub. Act 91-757, §10 (eff. January 11, 2001). The Pool Law provides, in pertinent part, as follows:

Sec. 107a.13. Group Workers' Compensation Pool Insolvency Fund.

(a) All qualified group workers' compensation pools shall pay a sum equal to 0.5% of all compensation and medical service payments made under either the Workers' Compensation Act or the Workers' Occupational Diseases Act during the 6 months immediately preceding the date of payment, into the Group Workers' Compensation Pool Insolvency Fund, the successor fund to the Group Self-Insurers' Insolvency Fund. On the effective date of this amendatory Act of the 91st General Assembly, all moneys in the Group Self-Insurers' Insolvency Fund shall be transferred into the Group Workers' Compensation Pool Insolvency Fund.

(b) The State Treasurer is ex-officio custodian of the Group Workers' Compensation Pool Insolvency Fund. Moneys in the Fund shall be deposited the same as are State funds and any interest accruing on moneys in the Fund shall be added to the Fund every 6 months. The Fund shall be subject to audit the same as State funds and accounts and shall be protected by the general bond given by the State Treasurer. The Fund shall be considered always appropriated for the purposes of compensating employees who are eligible to receive benefits from their employers pursuant to the provisions of the Workers' Compensation Act or Workers' Occupational Diseases Act when their employer is a member of a qualified group workers' compensation pool and the qualified group workers' compensation pool has become unable to pay compensation and medical service payments due to financial insolvency either prior to or following the date of award. Moneys in the Fund may be used to compensate any type of injury or occupational disease that is compensable under either the Workers' Compensation Act or the Workers' Occupational Diseases Act. The State Treasurer shall be joined with the qualified group workers' compensation pool as party respondent in any claim or application for adjustment of claim filed against a qualified group workers' compensation pool whenever the compensation and medical services provided pursuant to this Article may be unpaid by reason of default of an insolvent qualified group workers' compensation pool.

(c) Payment shall be made out of the Group Workers' Compensation Pool Insolvency Fund only upon order of the Director and only after the penal sum of the fidelity bond and securities, if any, has been exhausted. It shall be the obligation of a qualified group workers' compensation pool or its successor to make arrangements to repay the Group Workers' Compensation Pool Insolvency Fund for all moneys paid out in its behalf. The Director is authorized to make arrangements with the qualified group workers' compensation pool as to terms of repayment. The obligations of qualified group workers' compensation pools to make contributions to the Group Workers' Compensation Pool Insolvency Fund shall be waived on any January 1 or July 1, if the Fund has a positive balance of at least $2,000,000 on the date one month prior to the date of payment.

Sec. 107a.14. Group workers' compensation pools assessment provisions.

(a) When the Director determines by means of audit, annual certified statement, actuarial opinion, or otherwise that the assets possessed by a pool are less than the reserves required together with any other unpaid liabilities, he or she shall order the pool trustees to assess the individual pool participants in an amount not less than necessary to correct the deficiency. This Section is not intended to restrict or preclude the trustees from time to time levying

assessments or increasing premium deposits in accordance with the pooling agreement.

(b) When the Director determines that the compensation and medical services provided pursuant to this Article may be unpaid by reason of the default of an insolvent qualified group workers' compensation pool and the penal sum of the fidelity bond and the securities provided by the qualified group workers' compensation pool are about to become exhausted, the Director shall declare the qualified group workers' compensation pool to be in default and first levy upon and collect from the individual employer members of the qualified group workers' compensation pool in default an assessment to assure prompt payment of compensation and medical services. No assessment of any individual employer member of the qualified group workers' compensation pool made pursuant to this subsection shall exceed 25% of the average annual contribution paid by that employer over the previous 3-year period; however, if the Group Workers' Compensation Pool Insolvency Fund is then for any reason financially unable to assure prompt payment of compensation and medical services, the employer member may be assessed without limitation. If and only if (i) the Group Workers' Compensation Pool Insolvency Fund has a positive balance of less than $1,000,000, (ii) the Director has declared a qualified group workers' compensation pool to be in default, and (iii) the Group Workers' Compensation Pool Insolvency Fund is financially unable to pay all employees whose compensation and medical services have been approved, the Director shall levy upon and collect from all qualified group workers' compensation pools an assessment to provide the balance necessary to assure prompt payment of approved compensation and medical services. If an insurance carrier becomes liable for workers' compensation and occupational diseases payments under the terms of the policy covering the qualified group workers' compensation pool, the carrier shall make appropriate payments and payments from the Fund shall cease. Payments from the Fund shall resume only when the insurance carrier's liability is exhausted.

Sec. 107a.15. Authority of Director.

(a) If the Director determines that a group workers' compensation pool is not in compliance with this Article, the Director shall require the pool to eliminate the condition causing the noncompliance within a specified time from the date the notice of the Director's requirement is mailed or delivered to the pool.

(b) If a pool fails to comply with the Director's requirement, the pool shall be deemed to be in a hazardous financial condition, and the Director may take one or more of the actions authorized by law as to pools in hazardous financial condition.

215 ILCS 5/107a.13, 107a.14, 107a.15.

In examining the two statutes, one finds that the relevant portions of the current "Pool Law" are substantially identical to the old §4a, except that the Pool Law provides that the new Group Workers' Compensation Pool Insolvency Fund (hereinafter, the "Pool Fund") is to be administered by the Department of Insurance, whereas the old "Group Self-Insurers' Insolvency Fund" (hereinafter, the "Group Fund") had been administered by the Commission. See 215 ILCS 5/107a.13(c).

In Elsbury v. Stann, 371 Ill.App.3d 181, 861 N.E.2d 1031 (2006), a group of claimants received workers' compensation awards against employers covered by the Earth Care risk pool. The Commission found that because of the Earth Care insolvency, liability for payment of the awards rested upon the State, whether under

the old §4a of the Workers' Compensation Act or §107a.13(b) of the new Pool Law. The State Treasurer represented to the Commission that neither the old Group Fund nor the new Pool Fund could pay the awards, because both funds were themselves insolvent. Because the old §4a(5) provided that the Group Fund was to be "protected by the general bond given by the State Treasurer," the Elsbury claimants filed a writ of mandamus to compel the Treasurer to fulfill her statutory duty to financially protect the Group Fund by tendering the general bond of the State of Illinois. The Circuit Court granted the writ of mandamus, finding, *inter alia,* that petitioners had a right to receive payment from either the Group Fund or the Pool Fund. Elsbury, 371 Ill.App.3d at 182-185.

The Treasurer appealed. By then, all but one of the Elsbury petitioners had settled their claims. As to the last remaining petitioner, James Dobry, the Appellate Court affirmed the judgment of the Circuit Court in all respects. Noting that an injured worker's rights under the Act are governed by the law in effect on the date of the injury, the Appellate Court found that the Group Fund under§4a was the responsible payer, rather than the Pool Fund, which was created only after the date of petitioner's work injury. Accordingly, the Court ordered the Department of Insurance to transfer sufficient funds into the Group Fund from the Pool Fund, which is defined by the Pool Law as the successor to the Group Fund. The Court further concluded that the intent of the legislature was to ensure payment of benefits from the Group Fund without interruption, by having the Treasurer protect the Fund with the general bond of the State. Accordingly, the Court ordered the Treasurer to post the general bond of the State of Illinois to ensure the solvency of the Group Fund. 371 Ill.App.3d at 185-192.

The Illinois Supreme Court granted the Treasurer's petition for leave to appeal. By that time, the last remaining Elsbury claimant, Mr. Dobry, had settled his case at the Commission (see Dobry v. CMS. d/b/a Marko Constr., Docket No. 97 WC 43484). Accordingly, the Supreme Court dismissed the lawsuit as moot and directed the Appellate Court to vacate its judgment. See Elsbury v. Stann, No. 104388 (Ill. S. Ct.) (unpublished order entered April 28, 2008).

Notwithstanding the fact that the Appellate Court's judgment in Elsbury was vacated on grounds of mootness, the Arbitrator finds that the reasoning in the decision is sound and provides persuasive authority for the proposition that the Group Fund bears responsibility for payment of the instant claim; that sufficient funds should be transferred to the Group Fund from the Pool Fund, as successor to the Group Fund; and that the State Treasurer is required by statute to post the general bond of the State of Illinois, if necessary, to ensure the solvency of the Group Fund pursuant to the old §4a.

With reference to (B) (employer-employee relationship), the Arbitrator finds as follows:

Petitioner testified without rebuttal that II-in-One supplied his tools, materials and equipment and had the right to control the manner in which he performed his work. II-in-One hired Petitioner pursuant to its collective bargaining agreement with his union, Laborers Local 149, pursuant to which he was paid by the hour for a forty-hour workweek, with taxes withheld from his pay. Respondent had the right to discharge him, subject to the terms of the union contract. II-in-One was in the construction business, and Petitioner was a construction worker.

On these facts, the Arbitrator finds that the relationship of employer-employee existed between II-in-One and Mr. Stanley under both the common law "control" factors and the more modern "relative nature of the work" test. See Ragler Motor Sales v. Industrial Comm'n, 93 Ill.2d 66, 442 N.E.2d 903 (1982); Peesel v.

Industrial Comm'n, 224 Ill.App.3d 711, 586 N.E.2d 710 (1992).

With reference to (C) (D) and (O) (whether Petitioner was exposed to the hazards of an occupational disease that arose out of and in the course of his employment and dates of last exposure and disablement), the Arbitrator finds as follows:

Petitioner testified without rebuttal that while rebuilding waste tanks at the Metropolitan Water Reclamation District Skokie filtration plant, he was exposed to contaminated waste in the form of untreated, raw sewage for a period of one to two months. Ultimately he was diagnosed with hepatitis A, which Dr. Layden found to be causally related to the exposure to sewage.

Based upon the testimony of Petitioner and the uncontroverted opinion of Dr. Layden, the Arbitrator finds that Petitioner was exposed to the hazards of an occupational disease on and before October 18, 1997 that arose out of and in the course of his employment for II-in-One. Dates of last exposure and disablement both occurred on October 18, 1997.

With reference to (E) (notice), the Arbitrator finds as follows:

Section 6(c) of the Workers' Occupational Diseases Act provides, in pertinent part, that notice of disablement due to occupational disease shall be given to the employer "as soon as practicable after the date of the disablement," and that failure to give notice will not bar the employee from proceeding under the Act unless the Commission finds that such failure "substantially prejudices the rights of the employer." 820 ILCS 310/6(c).

In the instant case, Petitioner testified without rebuttal that he notified his supervisor, Dave Lester, of his illness when he began losing time from work after October 18, 1997. In addition, Dr. Layden wrote Respondent on October 22, 1997 advising of Petitioner's exposure to the hazards of an occupational disease resulting in hepatitis A. The Arbitrator therefore finds that Respondent received timely notice under §6(c) of the Act.

With reference to (G) (earnings), the Arbitrator finds as follows:

Petitioner testified without rebuttal that he was paid $22.35 per hour over a forty-hour workweek, for an average weekly wage of $894.00. Accordingly, the Arbitrator finds that the average weekly wage was $894.00.

With reference to (H) (age) and (I) (marital status), the Arbitrator finds as follows:

Petitioner testified without rebuttal that on October 18, 1997, he was 21 years of age and single with no dependent children. The Arbitrator adopts the unrebutted testimony of the Petitioner.

With reference to (F) (causal connection), the Arbitrator finds as follows:

On October 22, 1997, Dr. Layden opined that Petitioner's acute hepatitis A was a "work-related illness especially from his working in the sewer weeks prior to the onset of jaundice." Based upon the uncontroverted

opinion of Dr. Layden, the Arbitrator finds that Petitioner's condition of ill-being was causally related to the exposure.

With reference to (J) (medical), the Arbitrator finds as follows:

Medical bills totaling $13,062.40 are in evidence. Petitioner testified without rebuttal that he paid these bills out-of-pocket in their entirety. The Arbitrator notes that a paid bill is presumptively reasonable. Flynn v. Cusentino, 59 Ill.App.3d 262, 266, 375 N.E.2d 433 (1978).

Petitioner testified that his condition improved during his inpatient hospitalization and on outpatient follow-up with Dr. Layden. Petitioner's testimony was corroborated by the records of Dr. Layden and UIC Medical Center.

Based upon the above, the Arbitrator finds that the medical bills and treatment herein were in all respects reasonable, necessary and causally related to the injury. Accordingly, Respondent shall pay the sum of $13,062.40 for reasonable and necessary medical expenses.

With reference to (K) (TTD), the Arbitrator finds as follows:

Petitioner was off work from October 19, 1997 through November 2, 1997 while under the care of Ottawa Community Hospital, UIC Medical Center and Dr. Layden. He was released to return to work effective November 3, 1997. Accordingly, the Arbitrator finds that Petitioner was temporarily totally disabled for 2-1/7 weeks, from October 19, 1997 through November 2, 1997.

With reference to (L) (nature and extent of the injury), the Arbitrator finds as follows:

Petitioner testified that he has experienced no residual symptoms or complaints with reference to his acute hepatitis A. No permanent disability is claimed or awarded.

With reference to (N) (credit), the Arbitrator finds as follows:

Petitioner received payments from the Special Deputy Receiver for Illinois Earthcare Workers' Compensation Trust in Liquidation totaling $6,582.94. The Arbitrator finds that Respondent is entitled to receive credit in that amount.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
☒ Remand	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin Rafferty,

Petitioner,

14IWCC0129

vs.

NO: 06 WC 05568

City of Chicago,

Respondent.

DECISION AND ORDER ON REMAND FROM THE APPELLATE COURT

This matter had previously been heard and the Decision of the Arbitrator had been filed May 21, 2009. The Arbitrator found that Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent; that Petitioner established a causal connection between these accidental work related injuries and his condition of ill-being; that Petitioner is entitled to an award of 42-3/7 weeks of temporary total disability benefits (2/20/07-12/13/07) at a rate of $681.24 per week under §8(b) of the Act ($28,904.04 total TTD); that Petitioner is entitled to an award of $-0- for reasonable and necessary medical expenses under §8(a) of the Act as Respondent had paid all reasonable and necessary medical care; that Petitioner is entitled to an award of 40% loss of use of Petitioner's right arm under §8(e)(10) of the Act (94 weeks at $571.96 per week =$53,764.24 total PPD) and denied penalties. Petitioner claimed permanent and total disability.

- Mr. Belmonte testified for Petitioner at the initial hearing. He is a certified vocational rehabilitation counselor. He met with Petitioner on March 14, 2008. He learned of

Petitioner's permanent restrictions and that he was a high school graduate with no additional education or training. Mr. Belmonte understood that Petitioner did not own a computer or have any typing skills, and that he was a garbage collector for Respondent for about 26 years. Petitioner had a felony conviction for battery and intimidation of a witness. Petitioner was inarticulate and did not have transferable skills that could translate from heavy manual labor. Mr. Belmonte had recommended that Petitioner undergo vocational testing and that an upper extremity specific functional capacity evaluation (FCE) be considered. To Mr. Belmonte's knowledge no such testing was ever provided to Petitioner and without such testing he had no scientific basis to determine whether Petitioner could benefit from training. Therefore, Mr. Belmonte could not opine on Petitioner's prospective employability. However, Mr. Belmonte opined that there was "a very meaningful probability that [Petitioner was] facing the prospect of total disability." On cross examination, Mr. Belmonte testified he was aware that Petitioner did return to work with Respondent for some time after his accident. Petitioner did not avail himself of the rehabilitation training his company provides. On redirect, Mr. Belmonte testified Respondent did not authorize training.

- Petitioner testified at the hearing that on April 5, 2006 he had right shoulder surgery. Another surgery was recommended on his right shoulder and was performed on May 4, 2007, after the initial arbitration. Between the surgeries he could barely move his right, dominant arm, so began using his left. Then his left shoulder started to hurt. He returned to treat with his second surgeon, Dr. Nuber, for his left arm, as well as his right. Petitioner stated that after the second surgery, he had three injections into the right shoulder. He never had problems with his left shoulder prior to his fourth right shoulder surgery. On 12/13/07, Dr. Nuber restricted Petitioner permanently to sedentary activity with his right shoulder. Currently Petitioner was not taking prescription medication because it was no longer authorized. He has trouble sleeping, waking up 3 or 4 times a night. He has to sleep on his back to reduce shoulder pain. Weather impacts his right shoulder pain. He cannot throw a baseball or Frisbee with his kids. Petitioner testified that he graduated High School but had no additional training. Petitioner stated that he has to go to his sister's where she or his kids access the internet for him. Petitioner's driver's license was currently suspended. Petitioner further testified that after he was released to work in December 2007, "the city doctor – the specialist said [he] was never supposed to show up back to work." Petitioner had worked for Respondent as a garbage collector for 26 years. He never interviewed for a job and did not know how to write a resume or cover letter. His family has had to pay his mortgage and child support, on which he had fallen behind "big time." He would have followed up with Mr. Belmonte if it had been authorized. He was declared to be at maximum medical improvement (MMI) and had not had additional medical treatment after December 13, 2007. On cross examination, Petitioner testified he had not applied for any employment in the past 6 months. He returned to work for Respondent with restrictions, but he was discharged "as soon as [he] went back." There was some discussion about falsifying time sheets, which was funny

because as a laborer, he had no access to time sheets. On redirect, Petitioner testified after he was declared at MMI, Respondent did not offer him any employment.

- Petitioner filed a timely Petition for Review and on review the Commission vacated the permanent partial disability (PPD) award and ordered vocational rehabilitation testing and for Respondent to provide a rehabilitation plan and the Commission remanded the matter back to the Arbitrator for such order. The Arbitrator on remand, thereafter, found there was no new evidence and reinstated his initial award. Petitioner motioned under §19(f) requesting the decision be recalled, corrected and reissued. A hearing was held before Commissioner Gore on April 30, 2010 with Petitioner claiming a clerical error in remanding for vocational rehabilitation testing without ordering maintenance from maximum medical improvement (MMI) to present. The Commission found no clerical error and denied the motion. Petitioner brought the matter before the Circuit Court who initially found no jurisdiction and remanded the matter back to the Commission on August 3, 2010. A hearing on remand was heard on August 19, 2011 before the Arbitrator. The matter came before the Commission again August 2, 2012 wherein the Commission again affirmed their prior decision. The matter again went before the Circuit Court of Cook County June 3, 2013 which retained jurisdiction and remanded the matter back to the Commission for clarification of specific evidence as why the Commission removed the order to Respondent to provide appropriate vocational rehabilitation testing and for Respondent to submit a rehabilitation plan.

The Commission notes that, at the initial hearing before the Arbitrator, the Commission, on Review, found that Petitioner had failed to prove entitlement to permanent and total disability. On review, the Commission, in finding that Petitioner failed to establish permanent and total disability further indicated that Mr. Belmonte did not find Petitioner to be permanently and totally disabled, but had recommended vocational rehabilitation testing to assess Petitioner's vocational rehabilitation potential. The Commission ordered vocational testing, vacated the permanency award and remanded the matter to the Arbitrator for such action and additional hearing on that issue. The Arbitrator subsequently found no new evidence for such action and reinstated his prior award. The Petitioner, at the August 19, 2011 Commission hearing, did not contest and thus acquiesced to Respondent's position that no new evidence was permitted to be presented to the Arbitrator and, essentially, refused the Commission order for the vocational rehabilitation testing and vocational rehabilitation plan. At that hearing, Petitioner essentially indicated he did not believe the Commission's remand order required the taking of additional evidence (i.e., vocational rehabilitation testing and Respondent's rehabilitation plan) and Petitioner did not seek to enforce that Commission order. Petitioner in their Statement of Exceptions filed December 19, 2011 then did request the vocational testing, contrary to their prior assertions at hearing. Petitioner agreed at hearing with Respondent's position that no additional evidence was required/permitted and therefore rejected the vocational rehabilitation

testing and rehabilitation plan order. The Commission, therefore, has no other alternative but to reinstate the Decision of the Arbitrator to affirm the prior TTD, and PPD award of 40% loss of use of Petitioner's right arm based on the evidence on the record and Petitioner's acquiescence that no additional evidence was required or permitted.

The Commission therefore vacates its prior decision (which had ordered vocational assessment). Given the parties apparent agreement that no new evidence could be taken, the Commission, has no choice but to reinstate the May 21, 2009 decision of the Arbitrator, wherein it was found; that Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent January 24, 2006; that Petitioner established a causal connection between these accidental work related injuries and his condition of ill-being; that Petitioner is entitled to an award of 42-3/7 weeks of temporary total disability benefits (2/20/07-12/13/07) at a rate of $681.24 per week under §8(b) of the Act ($28,904.04 total TTD); that Petitioner is entitled to an award of $-0- for reasonable and necessary medical expenses under §8(a) of the Act as Respondent had paid all reasonable and necessary medical care; and that Petitioner is entitled to an award of 40% loss of use of Petitioner's right arm under §8(e)(10) of the Act (94 weeks at $571.96 per week =$53,764.24 total PPD) and the denial of penalties.

IT IS THEREFORE ORDERED BY THE COMMISSION that their prior decision on Review is, herein, vacated and the May 21, 2009 decision of the Arbitrator is, herein, reinstated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $681.24 per week for a period of 42-3/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. (As in the Arbitrators May 21, 2009 decision).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $571.96 per week for a period of 94 total weeks, as provided in §8(e)(10) of the Act, for the reason that the injuries sustained caused the loss of use of 40% of Petitioner's right arm. (As in the Arbitrators May 21, 2009 decision).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

14IWCC0129

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

DATED: FEB 20 2014
o-12/12/13
DLG/jsf
045

David L. Gore

Michael P. Latz

Mario Basurto

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse Choose reason	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify Choose direction	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Andrew E. Kroll,
Petitioner,

vs. No. 12 WC 01877

A. N. Webber Inc.,
Respondent.

14IWCC0130

DECISION AND OPINION ON REVIEW

Petition for Review having been timely filed by Respondent and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, prospective medical treatment, notice, causal connection, and temporary total disability, and being advised of the facts and law, modifies the April 1, 2013 §19(b) Decision of Arbitrator Andros as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

After considering the entire record, the Commission affirms and adopts the Arbitrator's findings with respect to all issues. However, the Commission modifies the Arbitrator's Decision by striking the following language, found on page 3 of the Arbitrator's Findings of Fact:

> This Commission has on a previous occasion found his opinions to be suspect. In Ferguson v. Harrah's Casino, this Commission affirmed and adopted the Arbitrator's decision in favor of petitioner. We did not find section 12 examiner, Dr. Lieber's opinions credible as they were diametrically opposed to every other treating or examining doctor who opined on a causal connection, including Respondent's other Section 12 examiner, who on two prior occasions and having reviewed surveillance produced by respondent, gave opinions in favor of Petitioner . 12 IWCC 0876. (attached) The same is true in the case at bar.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 1, 2013 is hereby modified.

IT IS FURTHER ORDERED BY THE COMMISSION that the language contained in the Arbitrator's Findings of Fact and cited above be stricken from the Arbitrator's Decision.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay all reasonable, necessary, and related medical bills for the treatment of Petitioner's bilateral shoulders, pursuant to the medical fee schedule, in accordance with and subject to §§8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary prospective medical expenses, as provided in Sections 8(a) and 8.2 of the Act, for the bilateral shoulder treatment recommended by Dr. Komanduri.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner temporary total disability benefits of $628.03 per week for 44-1/7 weeks commencing January 10, 2012 through June 5, 2012, and August 2, 2012 through January 11, 2013, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injuries.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $30,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 25 2014

o- 11/15/13
drd/dak
68

Daniel R. Donohoo

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR
& 8(a)

KROLL, ANDREW E
Employee/Petitioner

Case# **12WC001877**

A N WEBBER INC
Employer/Respondent

14IWCC0130

On 4/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0412 JAMES M RIDGE & ASSOC PC
MATTHEW J COLEMAN
101 N WACKER DR SUITE 200
CHICAGO, IL 60606

1408 HEYL ROYSTER VOELKER & ALLEN
TOM CROWLEY
120 W STATE ST
ROCKFORD, IL 61105-1288

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b) 8(a)

Andrew E. Kroll
Employee/Petitioner
v.
A. N. Webber Inc.
Employer/Respondent

Case # 12WC 001877
14IWCC0130

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George Andros**, Arbitrator of the Commission, in the city of **New Lenox**, on **January 11, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0130

FINDINGS

On the date of accident, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**$48,986.60**; the average weekly wage was $**$942.05**.

On the date of accident, Petitioner was **47** years of age, ***single*** with **1** children under 18.

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$15,694.75** for TTD, **$0** for TPD, **$0** for maintenance, and **$5,601.90** for other benefits, for a total credit of **$21,296.65**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $628.03/week for 44 1/7 weeks, commencing January 10, 2012 through June 5, 2012, and August 2, 2012 through January 11, 2013 as provided in Section 8(b) of the Act.

Respondent shall pay reasonable necessary medical services recommended by Dr. Komanduri regarding treatment of the Petitioner's left and right shoulders.

Respondent shall authorize all prospective medical treatment as recommended by Dr. Komunduri regarding Petitioner's left and right shoulders.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

George J. Andros

Signature of Arbitrator

March 30, 2013
Date

ICArbDec19(b)

APR 1 - 2013

FINDINGS OF FACT -KROLL

In regards to (c), the Arbitrator finds that the Petitioner has proven by preponderance of the evidence that he sustained an accident which arose out of and in the course of his employment. The Petitioner works as an over the road truck driver. On January 9, 2012, he made a delivery in Arkansas. When he opened the trailer doors an eight hundred pound pallet of computers fell on top of him. The pallet fell striking Mr. Kroll's right shoulder, forcing him to fall to the ground and strike his left shoulder. Mr. Kroll credibly testified to this incident. His testimony is corroborated by the following medical notes:

1.) **January 9, 2012, Lake County Medical Center.**
The triage note states "patient complains of neck, pain, and pain to both shoulders, after a pallet full of computers fell onto patient after opening the door to his trailer, patient states that the pallet struck him in the right side of the head and neck causing him to fall landing onto his left shoulder, denies LOC, C Collar applied triage SMC intact." (PX1)

2.) **January 9, 2012, Lake County Medical Center.**
Mechanism of injury: patient works at Wal-Mart, was unloading a semi when a pallet of laptop computers fell on patient striking right side of neck and right shoulder, knocking patient to the ground. (PX1)

3.) **January 9, 2012, MK Orthopedics, Phone Note.**
Summary of call: Patient is in Arkansas, states that a pallet fell on his head, neck, and right shoulder. Because of this, he fell onto his left shoulder. Patient states that he went to the ER, X-Rays were done. The ER told him that, per X-Rays, he has a "category 2 right shoulder separation," and, that he potentially tore something in his left shoulder. Patient was advised to make an appointment with MK or see another orthopedic in Arkansas. (PX3)

4.) **January 16, 2012, MK Orthopedics.**
History of Present Illness: "Andrew was involved in an accident on January 9, 2012, when a pallet fell off the back of a truck and struck him on the right shoulder and right side of his neck driving him into the ground onto his left shoulder. The pallet weighed 800 lbs. It appears that he was grazed rather than collapsed underneath the pallet. (PX3)

5.) **January 16, 2012, MK Orthopedics, Patient Intake Form.**
The Patient Intake Form from MK Orthopedics dated January 16, 2012. Mr. Kroll described an incident which occurred on "1/9/12" and described that his problem occurred when "a pallet of freight fell on me." He described his pain being located in both his right and left shoulder. (PX3)

Based upon the totality of the evidence, the Arbitrator finds as a matter of law and fact Petitioner sustained an accident, which arose out of and in the course of his employment as a truck driver.

In regards to (e), the Arbitrator finds that the Petitioner has proven by a preponderance of the evidence that he did give timely notice of the accident to his supervisor under Section 6(c).

Petitioner credibly testified that he gave notice to his supervisor. Respondent offered no evidence to rebut this. Nor did Respondent offer any evidence to show that it was unduly prejudiced by Mr. Kroll's form of notice. In fact, Respondent paid all medical and temporary total disability benefits until its section 12 physician issued a

report stating Mr. Kroll had reached maximum medical improvement. Therefore, the Arbitrator finds that the Petitioner gave timely notice of the accident to Respondent.

In regards to (f), (j), (k), and (l), the Arbitrator finds the following:

LEFT SHOULDER

The Arbitrator finds that the Petitioner has proven by preponderance of the evidence that his work injury caused his current condition of ill-being to the left shoulder requiring Mr. Kroll to be totally incapacitated and require further medical care.

Mr. Kroll credibly testified that he was struck by an eight hundred pound pallet of computers which forced him to fall to the ground and strike his left shoulder. This is corroborated by the above medical notes. (PX1, PX3)

Mr. Kroll testified that prior to this January 9, 2012 he had never before received any treatment to his left shoulder.

The Arbitrator notes that Mr. Kroll has had significant treatment to his right shoulder since 2007. However, in a review of all the medical evidence, the Arbitrator could only find two notes prior to January 9, 2012 regarding Mr. Kroll's left shoulder. Dr. Komunduri's medical records reflect that on 12/08/2008 a shoulder arthrogram of the left shoulder found severe acromioclavicular osteoarthritis and a high grade partial thickness tear involving the entire supraspinal tendon with a delaminating component. The infraspinatus tendon demonstrates a moderate grade partial thickness tear with associated severe tendinosis. On 01/23/2009, Dr. Komanduri provided pre-surgical orders to Mr. Kroll for a left shoulder arthroscopy and subacromial decompression with mini open rotator cuff repair to take place on 03/05/2009. However, the medical records are absent of any objective tests and surgical reports regarding the petitioner's left shoulder. On cross examination, Mr. Kroll credibly denied any treatment to his left shoulder on these dates, specifically that no surgery ever took place.

The Arbitrator reconciles this difference in three ways. First by reviewing the radiology reports performed on the day of the accident. (PX1) A view of the right shoulder showed findings of "postsurgical changes and grade 3 AC separation of indeterminate age." (PX1) The views of the left shoulder had no findings of prior surgery. (PX1) The Arbitrator also reviewed the medical records following January 9, 2012 accident. In the medical note dated January 16, 2012 Dr. Komunduri stated "Mr. Kroll is a patient well known to me who has had a previous right shoulder injury and surgery for a complex AC joint dislocation." (PX3) No medical note mentions prior treatment to the left shoulder. Last, there appears to be a pre-surgical order for left shoulder arthroscopy with a hand written slash through it and a hand written note stating, "patient canceled surgery wasn't sure when he could reschedule." Therefore, the Arbitrator finds Mr. Kroll's testimony credible in that he never before received treatment to his left shoulder prior to the date of the accident.

Following the accident Dr. Komunduri ordered MRI's of both shoulders. (PX3) He also took Mr. Kroll off work. On February 10, 2012, Dr. Komunduri reviewed the MRI arthrograms and diagnosed Mr. Kroll with full thickness rotator cuff tears in both shoulders. (PX3) Dr. Komunduri further opined "this is a fresh injury . . .and it

is directly causally connected to his work injury." (PX3) Respondent offered no evidence to rebut that Mr. Kroll's left shoulder injury was related to his work accident. Even Respondent's examing physician failed to comment on causation. Therefore, the Arbitrator finds as a matter of fact and as a conclusion of law Petitioner's left shoulder condition to be causally connected to his accident of January 9, 2012.

Dr. Komunduri recommended physical therapy and left shoulder arthroscopy, subacromial decompression, and mini-open rotator cuff repair. (PX3) Dr. Komunduri stated "we plan on taking care of his left shoulder first. . .[Petitioner] understands that the right shoulder will be addressed somewhere at around the three month mark if he does well with his left." (PX3) Dr. Komunduri performed surgery on March 15, 2012. (PX3) Following prescribed outpatient physical therapy. (PX3, PX5)

On May 31, 2012 Dr. Lawrence Lieber for Respondent's section 12 exam. Dr. Lieber noted that Mr. Kroll's flexion, abduction, and external rotation were "decreased with extremes secondary to pain." Dr. Lieber reviewed a surveillance video produced by Respondent's workers' compensation insurance carrier and noted:

> "Surveillance video from May of 2012 confirms petitioner driving a motor vehicle, frequent use of his upper extremities, overhead activity, as well as lifting up a trunk. Also confirms individual lifting packs of bottled water with no apparent distress, as well as pushing a cart and lifting multiple objects."

Just two and a half months since Dr. Komunduri performed open surgery on Mr. Kroll, Respondent's examining physician opined that "the petitioner requires no further treatment at this time or in the future in association with the work accident of January 2012."

Dr. Lieber further opined that Mr. Kroll's left shoulder had reached maximum medical improvement, he required no further narcotics, and he could return to work June 1, 2012 full duty. (RX1, RX2)

The Arbitrator does not find the opinion of Dr. Lieber persuasive compared to Dr.koumounduri.This Commission has on a previous occasion found his opinions to be suspect. In Ferguson v. Harrah's Casino, this Commission affirmed and adopted the Arbitrator's decision in favor of petitioner. We did not find section 12 examiner, Dr. Lieber's opinions credible as they were diametrically opposed to every other treating or examining doctor who opined on a causal connection, including Respondent's other Section 12 examiner, who on two prior occasions and having reviewed surveillance produced by respondent, gave opinions in favor of petitioner. 12 IWCC 0876. (attached) The same is true in the case at bar. The Arbitrator has reviewed Respondent's surveillance and did not see Petitioner perform any activities in contrast to his work restrictions. (RX7)

As of January 2, 2013, Dr. Komunduri continues to recommend physical therapy for the left shoulder. (PX4) He also continues to keep Mr. Kroll off work until his left shoulder be treated. (PX4)

Therefore, the Arbitrator as a matter of law under section 8 of the Act, orders Respondent to authorize all treatment as prescribed by Dr. Komunduri.

The Arbitrator further finds as a matter of law and fact that Petitioner is entitled to temporary total disability benefits from January 10, 2012 through June 5, 2012 and August 2, 2012 through January 11, 2013 (AX1) and orders Respondent to pay accordingly.

RIGHT SHOULDER

The Arbitrator finds that the Petitioner has proven by preponderance of the evidence that his work injury caused his current condition of ill-being to the right shoulder requiring Mr. Kroll to be totally incapacitated and require further medical care.

Mr. Kroll credibly testified that he was struck by an eight hundred pound pallet of computers which forced him to fall to the ground and strike his left shoulder. This is corroborated by the above medical notes. (PX1, PX3) Mr. Kroll testified that he has had a prior injury to his right shoulder which required extensive treatment. The Arbitrator takes note of the following medical records:

> 01/11/2007: Petitioner underwent a right shoulder arthroscopy with Dr. Komanduri.
>
> 01/15/2007: Petitioner returned for a post-op follow-up with Dr. Komanduri. X-ray indicated a coracoclavicular screw did not hold in the coracoid and has backed out which may require hardware removal at a later date.
>
> 08/03/2007: Following a 07/31/2007 FCE, Dr. Komanduri believed Petitioner may need a permanent 20lbs weight restriction at light duty level with his affected right shoulder only. However, use of the left shoulder could allow him to carry more weight. Dr. Komanduri found Petitioner to be at maximum medical improvement at this time.
>
> The Arbitrator takes judicial notice that on October 19, 2007, Petitioner settled his workers compensation case regarding his right shoulder.
>
> 11/27/2007: Petitioner visited Dr. Komanduri. Dr. Komanduri found that Petitioner regained full strength and full range and has no strength deficits as to his right shoulder. Dr. Komanduri noted Petitioner's shoulder seems much better than when he had previously seen him and provided permanent deficits. Petitioner was released on full duty.
>
> 10/19/2012 and 11/10/11: Petitioner presented to Dr. Komunduri with pain in right shoulder. Dr. Komunduri removes screw in his shoulder.
>
> 1/6/2012: Petitioner returns to Komunduri for follow up. (RX6)

Despite this pre-accident medical treatment, Mr. Kroll testified that he was able to work full duty with his condition. Following the accident, Dr. Komunduri ordered bilateral MRI arthrograms. He reviewed the MRI's and diagnosed Mr. Kroll with bilateral full thickness tears describing the injury as "fresh." (PX3) Therefore, the Arbitrator finds Petitioner's right shoulder condition to be causally connected to his work accident. Presently, Mr. Kroll's treatment to the right shoulder is on hold until he gains more strength in his left shoulder.